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No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

See vols. I 905-2906

CHET L. PARKER and LOIS M. PARKER,

Appellants,

vs.

TITLE AND TRUST COMPANY, a corporation, PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,

Appellees.

BRIEF OF APPELLANTS CHET L. PARKER AND LOIS M. PARKER

Upon Appeal from the District Court of the United States for the District of Oregon

HON. GUS J. SOLOMON, District Judge.

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JURISDICTIONAL STATEMENT

While there was but a single judgment order entered in the District Court, this appeal, by defendants Chet L. Parker and his wife, Lois M. Parker, is from what in substance are two judgments against them, one in favor of appellee Title and Trust Company and the other in favor of the several appellees Winans. In each case, the jurisdiction of the District Court is based upon diversity of citizenship.

The amended complaint filed by Title and Trust Company alleges that it is an Oregon Corporation, that appellants Parker were residents of the State of Washington at the time of the commencement of the action (R. 3), that the action involves a title insurance policy in the amount of $125,000.00, and that the amount in controversary exceeds $3,000.00, exclusive of interest and costs (R. 4). These allegations are admitted in the answer (R. 51).

Appellees Winans, in the lower court designated Third Party Defendants, filed a cross-claim charging that these appellants were guilty of slander against them in statements made by them to Title and Trust Company. They allege (R. 84), and the Parkers admit (R. 93), that the Winans are citizens of the State of Oregon and that the Parkers are residents of the State of Washington.

The jurisdiction of the District Court is therefore based upon 28 USCA, sec. 1332, and of this court upon 28 USCA, sec. 1291.

THE TITLE AND TRUST JUDGMENT

From this point on, this brief will first be devoted to the Parkers' appeal from the judgment of Title and Trust Company against them, until that subject is concluded, to be followed by their contentions regarding the judgment of appellees Winans against them. While some of the facts referred to in this first portion of the brief will be material in the latter portion involving the Winans' judgment, an attempt will be made to keep the two subjects segregated as much as possible.

STATEMENT OF THE CASE
(Title and Trust Judgment)

The question involved in this appeal is whether an owner's title insurance policy issued to these appellants, the Parkers, by appellee Title and Trust Company, dated September 12, 1951, is a valid policy so that a loss sustained thereon should be paid, or whether, as the court held, it is invalid and should be cancelled.

Among the admitted facts are the following: Chet Parker, one of the appellants and hereinafter sometimes referred to as Parker, ordered and received a title report from the Hood River Branch of the Title Company, paid the premium therefor, (F. 20, 21, R. 128-9), later obtained a purchaser's policy (F. 24, R. 130), and finally the owner's policy (F. 41, R. 139) each insuring the title to the property, with no exceptions material to this case. These three documents are in the Record, pages 32 to 48.

Shortly prior to the issuance of the owner's policy, the Title Company learned that the United States Government claimed title to a portion of the property (F. 41, R. 139) (this portion being referred to in the record as Lot 2). Though this property is in a Section 16, and therefore, under the Admission Act, title to it would normally pass to the state as "School Lands" (F. 6; R. 120-1), it is apparently now admitted by all that, despite the explicit language of the Admission Act, (R. 120-1), such transfer of title, because of decisions of the United States Supreme Court, e. g., *United States v. Morrison,* 240 U.S. 192, did not take place (R. 118).

The reason for this is that prior to any survey of that portion of the section in which Lot 2 is situated, the United States by Presidential Proclamation had this property set apart as part of the Mt. Hood Forest Reserve (R. 121-2). This defect in said title, as the court's opinion pointed out, "could have been discovered by the title company by a proper examination of the statutes and records, all of which were available to it" (F. 40; R. 139). Furthermore, no representations of any kind had been made to the Title Company by any appellant respecting the state of the title (Findings 31, 32, R. 134-5).

As the court's opinion further pointed out: "Ordinarily, under those circumstances a title company should be required to respond in damages for a failure of title to property covered by its policy." (R. 107)

However, recovery was denied because of the court's belief that there had been a conspiracy on the part of the Parkers and appellant Stegmann to defraud the title company by "concealing" from it information the Parkers were said to have had regarding the claim of the government. (R. 107-14)

This conspiracy, according to the opinion and findings, was formed on August 16th, 1951, after the Parkers obtained the title report and learned that it did not contain an exception of the claim of the United States Government. (F. 35; R. 136) The court also found—although this was denied by defendant Parker—that between the time that the title report was ordered and the date of its receipt Stegmann and Parker had been

advised by forest rangers that the title to a portion of this property was "in question" (F. 17; R. 127-8). There was also evidence that prior thereto Paul Winans had advised Stegmann of the claim of the government (F. 15; R. 125).

Two further contentions were asserted by the Title Company to defeat the policy, each of which was upheld by the court. These were (1) that the purchaser's policy of title insurance (which, it will be recalled, was supplanted by the owner's policy) contains a provision requiring immediate notification to the company upon receipt of any notice of defect of title, and that there was such a notice of defect and a failure to give such notification (R. 114-5, 139-40); and (2) that during the later negotiations for a settlement of the claim on the policy the Parkers represented they had paid $120,250.00 for the two lots covered by the policy and the court found that they had paid only $95,250.00 (R. 15, 140-1). The positions of appellants on these points are both that the findings are not supported by the evidence and also that these assumed facts would not legally constitute defenses to the policy.

Further facts, and some of the evidence, will be set forth hereinafter.

The principal questions involved are, therefore, (1) whether the evidence justified the court's conclusion that such a conspiracy to defraud the title company was formed; (2) even though it should be held that such a conspiracy existed, would it, in view of the other facts of the case, invalidate the policy of title insurance; (3)

whether the Parkers had notice of a defect, within the meaning of the purchaser's policy while they had that policy, and, if so, whether a failure to give notice of such defect is a defense to a claim under the later owner's policy; (4) whether in later negotiations for a settlement of the policy the Parkers falsified as to the amount paid for the properties covered by the policy and if so whether such fact is a defense to the policy. In short, the Parkers contend that the court was in error both upon the facts and the law in canceling the policy, and that judgment should have been entered in favor of the Parkers for the loss sustained by them as a result of this defect of title.

SPECIFICATION OF ERRORS
(Title and Trust Judgment)

(1) The court erred in entering judgment canceling the title insurance policies issued by the Title Company to appellant Chet L. Parker (R. 148) and in refusing to enter a judgment for him against the Title Company on the policy.

(2) The court erred in finding: that Paul Winans made a complete disclosure to Stegmann concerning the facts regarding his information of the claim of the United States and of a settlement he had obtained from a title company F. 15; R. 125); that Winans ever offered the two lots separately for different prices (F. 16; R. 125-6); that Chet L. Parker was advised by U. S. Forest Service representatives that the title to Lot 2 was in question (R. 127-8); that appellant Parker was not

present with Paul Winans on August 18, 1951 (F. 18; R. 128); that Parker was ever introduced to Winans as a surveyor or that Winans on August 31 or at any other time discussed with him the nature or basis of the claim of ownership of the United States or the settlement of a former insurance policy by Winans with another title company (F. 22; R. 129; F. 33, R. 135) ; that Paul Winans and Vawter Parker were unaware of the fact that Kenneth Abraham was representing appellants Parker or thought he was representing appellant Stegmann or that Winans advised Abraham respecting the claim of the United States prior to the delivery of the deed to Abraham (F. 26; R. 131-2); that Stegmann at any time was the agent of appellants Parker in negotiating with Winans, or that Parkers concealed from Winans the fact that they were purchasing the property or that Winans was unaware of that fact (F. 28; R. 133-4); that the Parkers concealed any facts from the title company (F. 29, R. 134; F. 37, R. 137-8; F. 38, R. 138); that prior to receiving the deed from Winans the Parkers knew of the claim of the United States to Lot 2 or that Ethel Winans had theretofore collected a substantial loss on a title policy by reason of the government's claim (F. 30; R. 134); that there was any scheme by Parkers to defraud the Title Company or that the issuance of a title report and title policies by the title company was "a necessary element in the scheme of defendants Parker . . . to defraud the plaintiff (F. 33; R. 135); that appellee Paul Winans did not represent to appellants Parker that Winans had a marketable title to Lot 2 (F. 34; R. 135-6); that on or about August 16, 1951, or at any other time prior to September 14, 1954,

appellants Parker knew the status of the title to Lot 2 or knew what information the Title Company had or at any time entered into any conspiracy to defraud the title company (F. 35; R. 136); that any act or statement by Parkers was pursuant to any conspiracy or for any improper purpose, or that they knowingly made any false representations to the Title Company with respect to the consideration paid by them or to the assignment of an option to them or of any other matter whatsoever or that said assignment was not bona fide (F. 36; R. 136-7); that the Parkers concealed from the Title Company any knowledge on their part respecting any defect in title (F. 37; R. 137-8), or concealed from the Winans family the fact that the Parkers were the persons negotiating for the purchase of the property or were obtaining title insurance (F. 38; R. 138); or that the Title Company relied on anything other than its examination of its records and some, but not all, the public records of the State of Oregon (F. 39; R. 138); or that the Parkers were guilty of any fraudulent conduct whatsoever (F. 41; R. 139); or that the Parkers received any notice of defect to the property prior to September 4, 1951, or that they did not give prompt notification to the Title Company after receiving any such notice or that any such failure was prejudical to the Title Company or constituted a breach of any policy provision (F. 42; R. 139-40); or that during negotiations with the Title Company the Parkers made any false representations (F. 43; R. 140-1).

Additional specifications of error with respect to the findings bearing upon the alleged liability of appellants

Parker to the Winans will be set forth in the portion of this brief devoted to the appeal from the Winans' judgment.

(3.) The court also erred in its Conclusions of Law (R. 144-5): that the equities were with the title company and against appellants Parker (II): that defendant Stegmann in all negotiations acted as the agent of appellants Parker or that communications received by him were within the scope of his authority (III): that appellants Parker were guilty of any misrepresentations to or concealment from the title company or that any wrongful acts on their part caused the issuance of the policies of title insurance or that the Title Company was entitled to a decree cancelling the policies (IV).

(4.) The court also erred in admitting a large amount of evidence of former transactions between appellants Parker and appellant Stegmann, and also of prior transactions between either or both of them and third persons, such evidence having no relevancy whatsoever upon any issues in this case and particularly having no relevancy on the contention that the Parkers and Stegmann entered into a conspiracy or that the Parkers intended or attempted to defraud the Title Company, all said evidence being of the type generally referred to as *res inter alia acta*. Inasmuch as this specification of error is based upon the irrelevancy and lack of any probative value of any such evidence, it is believed that, since the case was tried to the court without a jury, elaboration upon this specification of error is unnecessary at this point. Such elaboration will be made in the argument. (See infra, pages 39 to 45.)

SUMMARY OF APPELLANTS' ARGUMENT

Briefly, our contentions here are:

First. The Parkers deny that they had any information regarding the alleged claim of the Government until advised of it by the Title Company just prior to the delivery to them of that company's Owner's Title Policy; and it is our further contention that even though such information had come to the Parkers they would have been under no legal obligation to disclose it to the Title Company, and that a failure to do so would not be a defense under the policy. Further (without admitting that there is evidence of a "conspiracy"), we contend that no such obligation is created if two persons "conspired" not to disclose this information to the Title Company.

Second. There is admittedly no direct evidence of any so-called "conspiracy" between Stegmann and Parker to conceal from the Title Company information regarding this claim of the Government. The indirect and circumstantial evidence claimed to establish it consists of other facts and transactions entirely unrelated to the transactions here involved. Evidence of these unrelated transactions is not proof of any such alleged conspiracy.

Third. Our position relative to the other points, that the policy was avoided (a) by a failure to notify the Title Company of a defeat in title, or (b) by falsely stating the amount of the purchase price, has already been fully stated.

ARGUMENT

1. Statement of Additional Facts

Before discussing the relevant authorities, we desire briefly to present additional facts:

Additional Facts Leading Up to Purchase of Property and Issuance of Policy

On August 11, 1951, Paul Wimans, who was representing himself and the other appellees Wimans, gave an option to Walter Stegmann (who was a defendant in this case and is prosecuting a separate appeal) to purchase the property involved in this case. Stegmann paid $1,000.00 for the option, and the purchase price was to be $100,000.00. The option is in evidence (R. 30-1). While the property consisted of a single tract, it has for purposes of convenience been designated in this case as Lots 1 and 2. Lot 1, consisting of 15.80 acres, does not have the defect in title involved, this title defect covering the Northeast quarter of the Northwest quarter of Section 16, referred to in the record as Lot 2. As already stated, the reason for this defect is that although both tracts are in Section 16, normally school lands, there was a government survey of only a portion of the section—that in which Lot 1 is located. Any standard map or plat shows this. (See, e. g., that attached to the complaint at R. 15).

When Wimans gave this option, he knew of this claim of the Government. In fact, in 1943, with knowledge of this claim, he and his family, after being unable to sell

this property to the Government because of this defect, had obtained a title insurance policy through the same Hood River office with which Parker dealt, but in another title company; and shortly thereafter they collected from that company the sum of $3,000 in satisfaction of their claim against the policy. (R. 849-78; 2164-81)

Parker learned of this option the day after it was given, that is, on Sunday, August 12. (R. 211-15, 698, 1523-4). Stegman had obtained the option apparently with the idea of reselling it at a profit and he offered it to Parker. Parker was immediately interested. This interest arose from the fact that a few months theretofore he had sold a tract of timber to Multnomah Plywood Corporation, whose plant is in Portland (1221-3, 1370-1); and he knew that that company was looking for peeler logs, such as were to be found in the Hood River area.

Accordingly, the next day Parker went to Hood River and there did the following: (1) Ordered a title report from the Title Company's Hood River office (F. 20; R. 128-9, 193-4, 203-4, 221-2, 233-4), at which time he was told that there was already an outstanding title policy on the property (R. 193-4, 233, 351-2); (2) communicated by telephone with Multnomah's timber buyer and its timber cruiser, who were in Eugene, about 200 miles from Hood River, asking that the latter prepare to cruise this tract of timber as soon as possible (R. 1307-9); and, (3) visited the tract and spent some time making a rough cruise estimate of the amount and value of timber thereon (R. 224-7, 246-7).

That evening the Parkers met with Stegmann and obtained an assignment of the option. In addition to the $1,000 down payment, the option provided for an additional $4,000 payment upon the exercise thereof. (R. 238-52; Ex. C, R. 31) The Parkers and Stegmann testified that Stegmann was then given a $25,000 check (Ex. 40 A, R. 2112) for his rights under the option, it, however, being agreed that he should pay the additional $4,000 to Winans without further reimbursement, and should give notification of the exercise of the option (R. 246-7, 251-2). The Title Company claimed that the $25,000 check to Stegmann was a phony, and the court so found. (R. 111, 114, 137)

Parker proceeded to negotiate with Multnomah's timber buyer. He offered to sell the timber to that company for $180,000 under a long-term financing agreement which contemplated also modifying the terms on deferred payments for the other timber theretofore sold to it, mentioned above. (R. 1280-3, 1373-8) The matter was presented to the Board of Directors of Multnomah (1283-7), on August 20, the minutes of the meeting being in evidence (R. 2239-40).

Thereafter, the company's timber buyer, two of its loggers and two members of the Board visited the property and examined the timber. (1287-97). Both the company's buyer and its cruiser testified the property was well worth $180,000 and recommended the purchase. (1297-1306; 1330-4) On August 24, the Parkers and Multnomah's timber buyer met in the office of the attorneys for Multnomah, Messrs. Koerner, Young, Mc-

Colloch and Dezendorf, and conferred with attorney John Bledsoe of that firm, representing Multnomah. They directed him to prepare a contract, embodying the terms of their tentative agreement. (R. 1221-8; 1298-1300; 1380-1) This sale eventually did not take place, largely because the President, who had been absent form the city, did not approve it on his return. (R. 1225-6; 1326-7; 1381)

In the meantime, on August 16, Parker obtained his title report. (R. 206-11). On August 29, when Parker still thought the sale to Multnomah would go through, he was discussing another legal matter with an attorney, Lincoln Ferris, in Portland, and mentioned this proposed sale to Multnomah. Parker was laboring under the misconception that until he obtained title to the property he could not obtain a title insurance policy. He told the attorney he was in a quandry as to how to proceed because, though he had a title report, he knew Multnomah would wish a title insurance policy and, for the reason just stated, he could not then obtain one. The upshot of it was that Ferris telephoned the president of appellee Title Company, Edward Dwyer, who assured him that Parker was mistaken. He could not get an *owner's* policy but could get a *purchaser's* policy. (R. 287-90, 1231-9) Dwyer requested that Ferris bring to the office of the Title Company the option itself and the assignment, for inspection. This was done, and these documents were examined by title experts of the Title Company. (R. 1233-7). The option which they then examined, it should be pointed out, contained language which set forth, clumsily disguised, a limitation of optioner's liability, as follows (R. 31):

> "For which The Seller agrees to deliver a good and sufficient deed of conveyance showing title free and clear of all mortgage, contract, judgment or tax liens, conveying to The Buyer *all the right, title and interest of The Sellers* to the above described real property." (Italics added.)

This, if noticed at all by the Title Company, was satisfactory to it.

Accordingly, the next day the Title Company, at its Hood River office, accepted an order from Parker for a purchaser's title insurance policy. The assignment, or a copy thereof, was left with that office. (F. 23, R. 129-30) This policy was delivered September 4th. (F. 24, R. 130)

Because of delays, due largely to arguments respecting the setting apart of a portion of the property to be reserved by the Winans, the actual delivery of the deed was postponed until September 11. (R. 132) Parker had, in the meantime, arranged with the title company to exchange his purchaser's policy for an owner's policy, (Finding 27, R. 132-3, 176-7) He and Mrs. Parker called at the company's office—it is believed the actual date was September 14—and made this trade. (R. 322, 324)

However, in the meantime, the manager of the Hood River office, while at the court house two days before to make the final check on the state of the title, met a man from the Forest Service ranger station and in talking to him learned that the Government claimed title to Lot 2 (R. 176-7). The manager disclosed this fact to Parker when the latter called for the owner's policy but advised

him that inasmuch as a purchaser's policy had been issued, the company would give him the owner's policy, and this was done, with the approval of the Portland office (R. 176-7).

Parker consulted his lawyer, who advised him that he had nothing to worry about—the Title Company couldn't make a mistake of that kind (R. 326-7, 366).

But a few days later Parker received a letter from the Forest Service advising him of the Government claim (R. 326, Ex. 101, R. 2207). This letter was dated September 27, 1951, but on September 25 Parker's attorneys gave written notice of his claim to the company (R. 2215-6). There were quite extended negotiations with the title company. There were offers of settlement by the Title Company, introduced in evidence by it in this case (R. 1901-13). These negotiations are not particularly pertinent to this part of our argument, but will be discussed more later.

In addition to the notice which the Parkers obtained from the Hood River manager at the time of the delivery to them of the owner's policy, there is evidence of three other occasions, prior thereto, of notice of a possible defect in title. Two of these occasions involve alleged notice to Chet Parker, both of which are denied by him; and the third, after the deed was delivered but before it was recorded, was notice to Mrs. Parker, admitted, and in fact testified to, by her. We briefly relate these.

The first of these was the alleged incident, already noted, concerning which two forest rangers testified,

They said that two men visited the station on the evening of August 13 (F. 17, R. 127-8). This, it will be recalled, is the day on which Parker ordered the title report and inspected the property, and, later, obtained an assignment of the option. They testified that these men inquired about the Winans property, that they were shown the "status book" and told that Winan's title to Lot 2 was "questionable" and "not clear" (R. 1050, 1058-61, 1068-70). This information was itself obtained from the status book, which designated Winans as owner, the rangers having no further information regarding it. Photostatic copies of the relevant pages are in evidence (R. 2183-4). At the trial, about seventeen months after this event, they identified these two men as being Stegmann and Parker (R. 1056-7, 1071). Parker vigorously denied that he was at the Ranger Station on that date (R. 1362-5, 1405-10, 1424-6) or that he ever was given this information. Stegmann testified that he might have been there, but not with Parker (R. 1529-30, 1584-7).

Paul Winans, who it will be remembered handled the sale, testified that on many occasions he told various persons of the claim of the government, and, also, of the fact that his family had obtained the title insurance policy in 1943, related above, and on the basis of this defect had made a compromise settlement. He testified that he explained this claim of the Government to Mr. Stegmann. He also said that on August 31, 1951, being the day after the purchaser's policy was ordered by Parker and the premium therefor paid, and two weeks after Parker had obtained the title report— while he and

Parker, with Stegmann and others, were on the property in connection with surveying activities—he talked about the title difficulties, the claim of the government, the steps he was taking to clear the title by an Act of Congress, and related matters. There was difficulty keeping his testimony on the subject at hand and it is impossible to determine from his testimony when he claimed to have been talking to Parker and when to Stegmann and others (R. 831-5). Parker denies there was any such conversation. We set forth the testimony on this point in Appendix A.

The third occasion when it is claimed such notice was given was at the time of the delivery of the deed. Neither of the Parkers was present at that time, they being represented by attorney Kenneth Abraham of Hood River. Either immediately after the deed was taken by Abraham (R. 961) or while it was lying on the table together with the cashier's check for the final payment of $95,000.00, Winans made a statement which we believe is illuminating both as to the extent of the defect and also as to explanations, if any, which Winans may have theretofore made to Stegmann and to Parker, as he claims to have done. This statement as testified to by Abraham, as a witness for the Title Company, is as follows:

> "A. Well, Mr. Winans who was standing during that entire time, as I recall it, and I was standing because I was anxious to leave, said to me, he said, 'If Mr. Stegmann had been here I had intended to tell him concerning a defect in title having to do with a claim of the United States Government,' and he said, 'Since Mr. Stegmann is not here, I would like to tell it to you,' and he said, 'I would

suggest that he not record the deed because I think that this defect can be better clarified by possibly Congressional action in the name of the Winans family rather than in the name of Stegmann.' I think he must have spent another couple of minutes trying to explain what the defect is. I do not yet know to this day exactly what the nature of the defect is. I have not gone into it" (R. 943).

* * * * *

"A. He did not refer to the defect as being serious. He felt that the defect was one which could be corrected.

Q. Did he indicate that it was more technical than real?

A. I would say that he indicated it was more technical than real, yes" (R. 956).

* * * * *

EXAMINATION BY THE COURT

"Q. Would you think that a man who told you that it was necessary to have Congressional action to clear up a defect was representing that the defect was merely technical?

A. Well, I think that in saying 'technical' I was using his own term. I did not have any opinion at all with regard to the nature of the defect or whether it was substantial or not substantial" (R. 961).

As the court correctly stated in the findings, Abraham's employment was not "to obtain information regarding the title to Lot 2" (F. 26; R. 131), but he later—probably after the deed had actually been recorded—advised Mrs. Parker of what Winans had said, but told her there was nothing to worry about. Prior to the trial he had entirely forgotten that he told her about it (R. 957). That Mrs. Parker was concerned about it, however, is evidenced from an entry which she made in a sort of diary maintained jointly by herself

and her husband (R. 1453-5, 2226), although as she wrote in the diary: "Mr. A. says it wasn't important. As Title and Trust didn't show anything, it must not be." This diary was introduced in evidence by counsel for the Title Company (R. 1462). The Title Company's representatives first learned of the above conversation from Parker or his attorneys (R. 1785).

2. Legal Obligation to Title Company of Applicant for Title Insurance

We now proceed to a consideration of the legal problem as to what, if any, duty the Parkers might have owed the Title Company to advise them concerning information alleged to have been learned by them. In so doing, while strenously denying that the Parkers had notice of the claim of the government, we shall assume that they did. But we call attention to the following admitted facts:

(1) Nobody contends that anybody told Parker that Winans did not have title to the property. The contention is merely that he learned there was a defect in the title. Winans always contended that there would not be a great deal of trouble in clearing it. One of plaintiff's witnesses, a surveyor named Haynes, when asked about statements made by Winans to Stegmann regarding this claim of the government, seemingly was more impressed by the arguments advanced by Winans that the government's claim was without merit, than with his statement that such a claim existed. "He did have good title except for this claim that the government had on it," was

this witness' summary of Winans' contention (R. 1034). Attorney Abraham, as we have just pointed out, testified that Winans' statement to him indicated that the defect was "more technical than real."

Even the map on the ranger station had this particular 40 acres merely marked "Title not Clear" (R. 2184); and the two forest rangers testified that it was only this information that they conveyed to Stegmann and Parker. The Metsker map which Parker had in his car and which he consulted, the title company also using one (R. 194, 199), had the property designated "W. R. Winans" (R. 2213). W: R. Winans was the father of appellees Winans, and former owner.

It is not a case such as, for instance, an applicant knowing that there is a recorded deed or mortgage which the title company has missed. Probably very few lawyers cognizant of the general rules regarding school lands would, upon examination of the abstract in evidence (Ex. 6, 315; R. 1899, 2266-8), have failed to pass the title (and, in fact, title was apparently approved in 1938 and 1946 by an attorney for a mortgagee (R. 1718-21)), even though advised that some government employee had asserted that the government claimed the property.

The title company itself, with all its expert knowledge, after months of contemplating the legal aspects of the title, refused to take a positive stand.

For at the first conference between the Title Company's representatives and Parkers' lawyers, a plan was at first discussed of bringing proceedings to clear the

title; and this plan was abandoned only because of the time factor involved (R. 1842). And almost two months later the title company's attorneys wrote Parkers' attorneys that, "In the absence of any other evidence to the contrary, you are apparently correct in your assertion . . . that the legal title . . . is vested in the United States of America subject to whatever estoppel the parties holding under the deed from the State of Oregon may have a right to assert against the government" (R. 1921). Its original complaint, filed November 27, 1951, in which the United States was named as a party defendant (R. 2241-52), at no place states that the government owned the property. The prayer asks for a decree: "Determining and quieting the title to the said Lot 2, in the party or parties rightfully entitled thereto." Over a year later, December 29, 1952, the amended complaint, with its inconsistent and contradictory allegations, asks in the prayer for a decree declaring that the title policies do not insure against loss sustained "on account of any defect in or unmarketability of the title to Lot 2"; and also "Declaring what estate, title or interest in Lot 2 was conveyed to Chet L. Parker under the conveyance set forth in Exhibit B", and determining what loss or damage "was sustained by Parkers as a result of said defect in or unmarketability of the title to Lot 2" (Sub. 2, 7, 8; R. 22-3).

(2) But the fact that the point of law involved was obscure does not excuse the title company. The facts upon which the claim of the government was based were all matters of public record within the State of Oregon, admittedly available to it (F. 40, R. 139). The legal con-

clusion that because of those facts the government retained title, is set forth in the opinion of the Supreme Court of the United States, *United States v. Morrison,* 240 U.S. 192. Moreover, the "right, title and interest" obligation of the Winans as set forth in the option (R. 31)—that very cleverly worded document—while meaningless to a layman, should have been a red flag to the title company, whose experts, as already stated, examined it on August 29, 1951, before issuing a policy. Accordingly, there is no question but that, as the trial court found, this defect "could have been discovered by plaintiff by a proper examination of the statutes and records, all of which were available to it, and its failure to discover this defect of title was negligence on its part" (F. 40, R. 139). But the particular person in the Portland office of the Title Company to whom this matter was referred (R. 182-3) advised the Hood River manager that further search of public records was unnecessary, because, as the manager noted:

> "All sections 16 & 32 through S/O set aside by act of congress to S/O as school lands. Nothing further needed" (Ex. 3, R. 1880).

Besides, the company largely relied on the copy of the other Title Policy which it had (R. 194, 199-200) and upon which the other company had paid, because of this very defect.

(3) An uneducated layman—he went to the ninth grade in school (R. 1360)—hired the expert on real property titles to advise him with regard to this title and now he is told that he cannot collect upon the insurance which he later bought from the expert because,

forsooth, it is said that other laymen told him that the title was questionable, and that he should have believed them and not the expert he hired to advise him.

Failure to Disclose Information not Actionable Fraud.

Even assuming that the Parkers had the information above referred to (which is emphatically denied by them) it seems to us that the law is clear, particularly in Oregon, that there was no duty on their part to advise the Title Company of such information. To us it would seem ridiculous for a logger ordering a title report, or a title policy, to state to the company that he understood the title was "questionable" or "not clear." The very purpose of going to the title company is to learn from an expert whether the title is clear and unquestionable.

Bearing in mind that, as is admitted and the court found (F. 32, R. 135), no affirmative representations of any kind were made, the very first element of actionable fraud is absent.

It should also be borne in mind that by a long line of cases in Oregon, as well as elsewhere, fraud is never presumed, and must be established by clear, strong, satisfactory and convincing evidence. The Oregon authorities are reviewed in *Metropolitan Casualty Insurance Co. v. Lesher,* 152 Or. 161, 167-73, 52 P. 2d 1133, 1136-8.

But more important, it is also the law in Oregon, as elsewhere, that where individuals are dealing at arm's

length they must look out for themselves, and mere silence is not fraud.

In *Frederick v. Sherman,* 89 Or. 187, 173 P. 575, plaintiffs had recovered a verdict and judgment on an alleged fraud action in which they claimed they were defrauded in the purchase of an exclusive right to sell certain patented automobile tires. The complaint alleged, and the evidence established, that the manufacturer of the tires was "wholly insolvent and bankrupt" and that defendant had known this. Accordingly the court, as it stated, was "called upon to say whether the allegations of the complaint in regard to fraudulent concealment of facts, states a cause of actionable fraud." (89 Or. at 190, 173 P. at 576.) The court held that it did not. It quoted with approval from Story on Contracts (5th ed.), sec. 517:

> "Thus, it is the general policy of the law, in order to induce vigilance and caution, and thereby to prevent those opportunities of deceit which lead to litigation, to throw upon every man the responsibilities of his own contracts, and to burden him with the consequences of his careless mistakes."

The court also quoted from Bigelow on Fraud, p. 590, in which that eminent author discussed whether "pure silence" could be fraud, as follows:

> "But speaking of pure silence, the general rule stated is very strong. It governs, even though the silence was meditated, and with knowledge that the opposite party was laboring under mistake or ignorance."

The above Oregon case has been referred to as one which holds "that even meditated silence may not be fraudulent." *McGinn v. McGinn,* 50 R.I. 236, 146 Atl. 636, 638.

There are, of course, exceptional circumstances where a duty to disclose facts exists. Generally speaking, these fall into three caterogies: (a) where a fiduciary or confidential relationship exists; (b) where one has created a wrong impression by some artifice, such as speaking half-truths where "the opposite party . . . has not equal means of knowledge," e.g., *Palmiter v. Hackett,* 95 Or. 12, 17-8, 185 P. 1105, 1106, 186 P. 581; and (c) in case of sales of property where the seller knows of facts, not available to the buyer, which destroy the value of property sold. *Clearwater v. Forrest,* 72 Or. 312, 143 P. 998 (sale of animals with a latent disease); *Musgrave v. Lucas,* 193 Or. 401, 238 P. 2d 780 (sale of sand and gravel business and gravel bar on navigable river, seller failing to disclose that he had been threatened with litigation by Federal Government if sand or gravel were removed.). But with the above exceptions, "fraudulent concealment" consists only of some "affirmative act likely to prevent or intended to prevent knowledge of a fact." Restatement of Contracts, sec. 471, comment "f"; 23 Am. Jur., Fraud and Deceit, sec. 77, pp. 853-4.

Necessity of Reliance by Representee on Representor's Statement or Conduct.

But the Title Company should be denied recovery not only because there was no duty on the part of the Parkers to advise it of the information which it is claimed they had with respect to a possible defect, but also because it was not justified in relying upon the Parkers for any such information, nor did it so rely. This is, of course, basic in the law of fraud.

Certainly there cannot be said to be reliance upon the representations (or upon silence) if the representee makes his own independent investigation; and much clearer is it that there is no right of reliance if the investigation was undertaken, as here, at the request of the representor. The general law on the subject is set forth in 37 C.J.S., Fraud, sec. 37, pp. 284-6, as follows:

> "One cannot secure redress for fraud where he acted in reliance on his own knowledge or judgment *based on independent investigation.* This rule is especially applicable where the representee's investigation was undertaken *at the suggestion of the representor.* If it is established that the representee relied on his own judgment and not on the representor's statements, he cannot recover, *even though he was genuinely deceived* by the representations and his investigation was of an incomplete or ineffectual character.
>
> "Obviously there can be no recovery if the investigation revealed the true facts so that if the representee was deceived at all he in effect deceived himself. Where the representee undertakes an independent investigation he is *ordinarily chargeable with knowledge of all the facts which such an investigation should disclose,* and has no right to rely on the representor's statements.
>
> "There is authority holding that, even though no investigation was actually made, the fact that one was agreed on will preclude the right to rely on representations. Similarly there can be no recovery for representations, where the representee acted solely on the reports or advice of third persons, as where he relied on information from his own agents, the advice of counsel, *the report of a title company,* or the valuation of appraisers." (Italics added)

The above rule of law is often applied in cases of sales of property, where the purchaser makes his in-

dependent investigation. This type of case was before the Oregon court in *Ziegler v. Stinson,* 111 Or. 243, 224 P. 641. There the court, after laying down the general rules of fraud, including reliance upon the representations by the purchaser proceeded as follows (111 Or. at 252, 224 P. at 644):

> "It is held in this jurisdiction that the rule of *caveat emptor* applies 'where a party alleged to have been deceived by the false representations of his adversary has full means of knowing the truth, and has acted in the transaction on his own judgment.' *David v. Moore,* 46 Or. 148 (79 Pac. 415); *Wimer v. Smith,* 22 Or. 469 (30 Pac. 416); *Cawston v. Sturgis,* 29 Or. 331 (43 Pac. 656)."

To the same effect are *Slaughter's Administrator v. Gerson,* 13 Wal. (U.S.) 379, and *Farnsworth v. Duffner,* 142 U.S. 43, 35 L. Ed. 931.

Not only is the representee barred from recovery when he makes an independent investigation, but even though he makes no such investigation he cannot recover if he has equal or greater means of acquiring information than the representator, since in such a case reliance upon the representation is not justified. The following quotation from a decision of the United States Supreme Court has been quoted three times with approval by the Oregon Supreme Court:

> "When the means of knowledge are open and at hand or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor." *Shappiro v. Goldberg,* 192 U.S. 232, 241-2, quoted with approval in

Linebaugh v. Portland Mtg. Co., 116 Or. 1, 15-6, 239 P. 196, 201; *Fairbanks v. Johnson,* 117 Or. 362, 368, 243 P. 1114, 1116; *Crouch v. Butler,* 119 Or. 344, 349, 248 P. 849, 850.

A good illustration of this rule is *Palmberg v. City of Astoria,* 112 Or. 353, 383-6, 228 P. 107, 229 P. 380, 382-3, where plaintiff claimed that he entered into a contract for excavation work upon false representations of city officials as to the quantity to be excavated, but was denied recovery because the actual figures could have been obtained from the plans and specifications.

Another Oregon case, being, like the present one, a so-called "conspiracy to defraud," is *Gabriel v. Collier,* 146 Or. 247, 29 P. 2d 1025. The object of the conspiracy was said to be to deprive plaintiffs of real property, among other means through connivance with a receiver in failing to protect it against foreclosure. In furtherance thereof it was charged that "defendants persistently kept plaintiffs in ignorance of what was transpiring" (146 Or. at 250). The court's answer was short and to the point: "Everything that was done was a matter of record and plaintiffs could easily inform themselves. Defendants were under no obligation to furnish plaintiffs any further information" (146 Or. at 258, 29 P. 2d at 1029).

Another good illustration is *Weir v. School District,* 200 Wn. 172, 93 P. 2d 308, 123 A.L.R. 1057, where a school principal in negotiating for an increase in salary stated that he had interviewed the county superintendent and had learned from him that the school's budget was sufficient to pay him the salary he requested. The direc-

tors granted the increase, but later on learning that the statement was false, attempted to rescind. The court held that, since the actual facts were available to them, the directors could not avoid the contract even though this representation was false and relied upon.

"We are aware," the Washington Supreme Court said in the above case (93 P. 2d at 311), "that the tendency of the modern decisions is to restrict rather than to extend the rule requiring diligence on the part of the injured party and similar rules such as *caveat emptor.*" The opinion thereupon cited illustrations of this modern tendency, and then continued:

> "But in these later cases it is to be noted that there was a false assertion of an existing fact usually with reference to property, the truth of which fact was peculiarly within the knowledge or means of knowledge of the declarant; or the property was at a distance and the opportunity of ascertaining the true fact was not readily at hand; or the misrepresentation was made for the purpose of preventing an investigation and ascertainment of the true fact; or the declarant knew that the other party did not intend to make a personal investigation, but relied solely on the truth of the fact communicated by the declarant."

To the same effect is *Goess v. Ehret,* 85 F. 2d 109 (2nd Cir.), in which a bank director contended he was induced to purchase stock in the bank by misrepresentations of its President concerning its financial condition. The court held this was no defense, Judge Learned Hand stating that the director "was never wronged at all" since in effect he accepted the President's word "as a substitute for the discharge of his own duties."

Another decision often referred to is that of the Supreme Court of the United States in *Andrus v. St. Louis, etc., Refining Co.*, 130 U.S. 643, 32 L. Ed. 1054, in which a purchaser of land claimed he was misled by false representations of officers of the seller that they had obtained releases of claims to the land by other persons in possession, but relief was denied because the purchaser did not inquire of the persons in possession thus referred to. Professor Williston has pointed out the influence of this decision, in these words:

> "Nevertheless, the fact that the Supreme Court of the United States has stated that 'the law does not afford relief to one who suffers by not using the ordinary means of information whether his neglect be attributable to indifference or credulity' continues to be influential in leading courts often to reach their conclusions by deciding whether reliance was justified, rather than whether there was reliance in fact on misrepresentations intended to induce that reliance." 5 Williston on Contracts, Rev. Ed., sec. 1516, p. 4232.

Cases similar to the above but probably closer on their facts to the one here involved are those in which a grantor is given false information regarding the state of his title but before selling engages an attorney to investigate and receives similar erroneous information. He is denied relief because he is deemed to have acted in reliance upon the attorney's opinion, not the purchaser's false representations. The decisions are collected in an annotation in 136 A.L.R. 1299, at 1303, as follows:

> Saltonstall v. Gordan, 33 Ala. 149.
> Woodrow v. Riverside Greyhound Club, 192 Ark. 770, 94 S.W. (2d) 701.
> Cobb v. Wright, 43 Minn. 83, 44 N.W. 662.

In the present case, there was not the slightest hint in the testimony of any officer or employee of the Title Company of reliance upon anything except their own investigation. In fact, not only did the Title Company rely upon its own investigation but the Parkers themselves relied upon the Title Company, not only in paying the premium but in paying the purchase money. And the actual facts in the present case are not only that the defect "could have been discovered by plaintiff [Title Company] by a proper examination of the statutes and records, all of which were available to it" but "its failure to discover this defect of title was negligence on its part" (F. 40, R. 139).

Insurance Cases—Generally.

Anciently there was a rule in marine insurance law that the applicant must disclose to the underwriter all material circumstances within his knowledge which could affect the risk. But as Judge Swan pointed out in *Hare & Case v. National Surety Co.,* 60 F 2d 909 at 911 (2nd Cir.), citing Lord Mansfield's opinion in *Carter v. Boehm,* 3 Burr, 1905, the reason underlying this rule was that "since the special facts upon which the contingent chance is to be computed most commonly lie in the knowledge of the insured only, the underwriter proceeds upon confidence that he does not hold back any known fact affecting the risk, and is deceived if such a fact is concealed, even though its suppression should happen through mistake and without fraudulent intention."

As Judge Swan proceeded to explain, this principle has been relaxed in the case of various types of insurance other than marine "because of the practice of insurers to make inspections or ask questions which may reasonably be supposed by the insured to produce whatever information the insurer wants."

Even in the case of marine insurance the rule has been greatly relaxed because, as a leading authority points out, "it must be presumed that the insurer has in person or by agent, in such a case, obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him." Vance on Insurance (3d ed.), sec. 61, p. 375, quoting from *Clark v. Insurance Company,* 8 How. (U.S.) 235, 249.

And so it is now the law of insurance generally, including even marine insurance, that there is no obligation on an insured to disclose matters which are either known to the underwriter or which are equally within his reach and which by due diligence he may discover. Vance on Insurance (3d ed.), sec. 64, p. 381; 45 C.J.S., Insurance, sec. 645, p. 549.

In fire insurance policies it is common to insert a provision that the policy shall be void "if the insured has concealed, or misrepresented, in writing or otherwise, any material fact or condition concerning the insurance." But, even here, more than failure to disclose a known fact is required to avoid the policy. This is manifest from the decision in *Arthur v. Palatine Insurance Co.,* 35 Or. 27,

29-30, 57 P. 62, 63. There Mr. Justice Robert S. Bean, in giving the opinion of the court, said:

> "The policy was issued upon an oral application . . . and no statements or representations whatever were made in reference thereto by the assured or anyone in their behalf. In such case the intention of the assured becomes of controlling importance, and, in order to avoid the policy, it must appear, not only that the matter concerning which the insurer had no information was material to the risk, but that it was intentionally and fraudulently concealed by the assured . . . But the mere failure or neglect to make known, without inquiry, facts which the insurer may regard as material to the risk, is not a breach of the provision of the policy above quoted, because the assured has the right to assume that the insurer will make proper inquiry in reference to such matters as it may deem material to the risk, and that it waives knowledge as to all other matters, except, possibly, in reference to unusual or extraordinary circumstances within the knowledge of the assured but of which there is nothing to put the insurer upon inquiry."

Title Insurance Cases.

In applying the above rules of actionable fraud to cases involving title policies, it is important to bear in mind the nature and purpose of title insurance.

As we have already endeavored to stress, the business of examining titles to real property is a business for experts. The New York Court of Appeals said, in a case which we consider to be of importance here:

> "To a layman, a search is a mystery, and the various pitfalls that may beset his title are dreaded, but unknown. To avoid a possible claim against him, to obviate the need and expense of professional advice, and the uncertainty that sometimes results even

after it has been obtained, is the very purpose for which the owner seeks insurance." *Empire Development Co. v. Title Guarantee & Trust Co.,* 225 N.Y. 53, 121 N.E. 468, 470.

The "professional advice" referred to by the New York Court not only advises the prospective purchaser whether there was a "flaw in the title," whether it is "questionable" or "not clear." This is not what the purchaser wants, at least not all he wants. If the search shows something wrong, he wants assurance that he will not suffer as a result. And so the New York court held in the above case that the fact that the purchaser knew of the defect in the title at the time of the purchase—in fact, in that case, he had contracted to take it subject to liens—was immaterial.

For their purpose in obtaining the insurance was to have indemnity against the *results* thereof. The lien, the court said, "might be vacated or reduced. The proceedings might be without jurisdiction or void. Against the payment of these liens, they had the right to secure themselves." As the court said, "mere knowledge of a defect by the insuring owner would not constitute a defense. A title insurance policy is much in the nature of a covenant of warranty or a covenant against incumbrances. Here we have held that knowledge is immaterial. We see no reason for applying a different rule as to such policy."

Other courts also—perhaps influenced by the language of the policies, as in our present case, that the company insures "against loss or damage which the in-

sured may sustain by reason of any defect"—have held that knowledge by the insured of defects in the title is no defense. Among these cases are *Maggio v. Abstract Title & Mortgage Corporation,* 98 N.Y.S. 2d 1011 (App. Div.), in which distinctions between a "guaranteed title search" and "title insurance" are discussed; *Alabama Title & Trust Co. v. Millsap,* 71 F. 2d 518 (C.C.A. 5th) holding that notice of a defect does not bar recovery even though the policy requires that the insured be a "purchaser for value": *First Carolina Bank v. New York Title & Mortgage Co.,* 172 S.C. 435, 174 S.E. 402, 404, holding that knowledge of agent of insured of a defect of title was immaterial since the insurance company relied upon the investigation by its own agents; and *Jones v. Southern Surety Co.,* 210 Ia. 61, 230 N.W. 381, 385, protecting a purchaser who purchased from a known incompetent person, he not being guilty of misrepresentation or concealment in his application.

Many title companies, no doubt influenced by decisions such as the above, have expressly provided in their policies that among the defects excepted from the coverage are those of which the purchaser had notice and failed to disclose, or to the creation of which he was a party, and similar provisions. Thus, a form in use in California excepts "defects, liens or encumbrances . . . created or suffered by the insured, or known to the insured to exist at the date hereof and not disclosed in writing to the company." (*Vernon v. Title Guarantee & Trust Co.,* 7 Cal. App. 2d 171, 46 P. 2d 191); and a form in use in Massachusetts has provided that the insured's "failure to disclose any known liens upon, or

adverse claims to the estate . . . shall avoid this policy." (*Clarke v. Massachusetts Title Insurance Co.,* 237 Mass. 155, 129 N.E. 376); and, in Illinois, "rights or claims not shown of record at the date of this policy if known to the party guaranteed." (*Taussig v. Chicago Title & Trust Co.,* 171 F. 2d 553, 555 (C.A. 7th).

But in the present case, as we hope the court will bear in mind, the facts are that (1) the title policy (R. 41-8) has no such exceptions, (2) even if appellee's evidence be taken at face value, the insured had no knowledge of the precise defect, but only that the title was "questionable" or that a third party i.e., the United States,—whose own records disclosed only that the Winans' title was "not clear,"— claimed the property, and (3) the actual state of the title was a matter of public record, available to the title company.

Up to this point we have been discussing cases where a person says nothing, refrains from calling attention to something which a party with whom he is dealing might consider important. The findings, however, state certain affirmative conduct by Parker (R. 136-8). This, it is said, was pursuant to a "conspiracy," and we shall discuss that conduct after a discussion of the charge of conspiracy.

3. Re. The Alleged Conspiracy

At no place in either the original complaint (R. 2241-52) or in the amended complaint (R. 3-24), is there any suggestion of a conspiracy. Whether plaintiff's attorneys obtained this idea during the trial upon learning what

appeared to be rather pronounced views of the trial judge in opposition to their theory that there was a duty on the part of Parker to disclose facts which they claim he knew (R. 158-64), or whether they got the idea from the judge's opinion, we do not know.

Legal Effect of alleged conspiracy.

Nor do we regard it as important. It is very clear that the charge of "conspiracy" adds nothing to the case. It's only effect, if any, would be to charge Stegmann with Parker's alleged defaults. For it is well settled, certainly in Oregon, that in historical tort actions, such as slander, malicious prosecution or fraud, the only function of the charge of conspiracy is to connect each of the defendants with the wrongdoings of the other, nothing more. In Oregon, this was definitely established in the case of *Gabriel v. Collier,* 146 Or. 247, 29 P. 2d 1025, already referred to. In that case, as here, it was claimed that there was a conspiracy to defraud, but with respect to this the court said (146 Or. at 255, 29 P. 2d at 1028):

> "The allegation of conspiracy, if sustained: 'Only being important to connect a defendant with the transaction and to charge him with the acts and declarations of his co-conspirators, without which he would not be implicated.' "

The Oregon court credited the above quotation to the New York opinion in *Green v. Davies,* 182 N.Y. 499, 75 N.E. 536, 3 Ann. Cas. 310, a leading case on this subject. Actually, however, it originated in an earlier New York case, *Brackett v. Griswold,* 112 N.Y. 454, 20 N.E. 376, and was quoted in the Green case. Other por-

tions of that quotation, omitted in the Oregon opinion above referred to, are (75 N.E. at 537):

> "The gravamen is fraud and damage, and not the conspiracy . . . But a mere conspiracy to commit a fraud is never of itself a cause of action and an allegation of conspiracy may be wholly disregarded. . . . "

Other Oregon decisions to the same effect are *Teller v. Commercial Credit Co.,* 149 Or. 372, 375-6, 40 P. 2d 1018, 1019, an alleged conspiracy to injure credit by refusing to honor checks; and *Strycker v. Levell,* 183 Or. 59, 68, 190 P. 2d 922, 926, an alleged conspiracy to libel the plaintiff. In this latter case, plaintiff tried to avoid the defense of privilege by calling it a conspiracy, but as the court said: "The plaintiff cannot avoid the defense of privilege which appears in her own complaint by giving to a libel suit the name of an action on the case for conspiracy.

Evidence of Alleged Conspiracy.

We may be mistaken in our assumption that what we are going to talk about now was, or will be, claimed by plaintiff's counsel to be evidence of the alleged conspiracy. However, whatever its purpose might have been, about which we have been left in the dark, it was considerably emphasized by counsel and apparently was influential with the court—although much of it seemed by the court to be unimportant when introduced—so we feel that it must be discussed, and we do so now. This large volume of evidence, all of which it seems to us was clearly inadmissible as *res inter alia acta,* may

roughly be divided into (1) other transactions between Parker and Stegmann, no third parties being involved, and (2) other transactions between one or both and third parties.

Former Transactions Between Parker and Stegmann.

The court's opinion points out that Parker contended that Stegmann was not his agent when he purchased the option from Winans and then says, "This is a fantastic story" (R. 109). The opinion says the story starts "with an alleged one year 4% loan by the Parkers to Stegmann of $22,000, delivered to him in currency, and secured by an unrecorded chattel mortgage on old equipment worth considerably less than the amount of the loan." The court must have overlooked the fact that this "fantastic story" of a loan which took place November 20, 1950, nine months before the option was given, was not related by Parker, nor by Stegmann, in proof of the non-existance of an agency. It was not, in fact, related by either of them in proof of anything. It was not part of the Parkers' case. They told about it because they were required by adverse counsel to do so, first, in depositions (R. 1972-80, 2032), and, second, at the trial (R. 380-92, 400-2, 583-93). This story of a loan transaction between two uneducated loggers and their manner of handling it *inter se,* may or may not be fantastic, depending upon the point of view, but it has never been put forth by Parker, nor for that matter by Stegmann, as proving anything in this case. It doesn't prove anything.

The same may be said of Stegmann's "equally fantastic" explanation of how he used this money; and also of the "equally vague and improbable" (R. 110) testimony of another loan in May, 1951, of $10,000.00 (R. 408-16, 588-92, 624-5), and another of approximately $6,000.00 to build a road (R. 428-9, 483, 639-43). All this testimony, as stated, was not offered by Parker, nor by Stegmann. None of it has anything to do with this case.

Transactions with Third Persons.

Other events and transactions, concerning which a plethora of testimony burdens the record, but having no relevancy to the present lawsuit, much of which we felt was being admitted with great reluctance by the court, include the following: (1) The Murphy-Nelson-Rutherford transaction under which a Mr. Rutherford took over logging operations under an arrangement whereby Parker was to be paid money owed him by Stegmann (527-31, Ex. 34, R. 2090-6); (2) the purchase of the Johnson timber by the Parkers and the sale thereof to McCormick Lumber Company, Stegmann being paid a "finder's fee" (R. 591-3, 658-9, 1205-7); (3) the truck-tractor accident, involving a truck and tractor belonging to Stegmann, on which Parker and a Mr. Heider, a lawyer, had successive mortgages, which was wrecked, and the salvage purchased by Parker from an insurance company (R. 453-7, 633-9, 643-5, 1481; Ex. 77-82; R. 2187-99); (4) purchases by Stegmann of timber from others—Johnson (660), Walter (693-4; Ex. 30; R. 2085-6), Kaltenberg (696), and others; (5) the "jeep"

deal whereby Parker traded in a jeep to an automobile dealer on another jeep which he was purchasing, Stegmann being involved because, for a time, he was going to purchase Parker's jeep, but didn't, resulting, so it was claimed, in the dealer being "gypped"—whether of $50 or $300 is not clear (R. 1173-83, 1368-9, 1415-9); (6) the Ellis matter, in which Stegmann owned a truck, subject to a repair bill to Willamina Garage and also to a mortgage in favor of attorney Heider (who was sometimes attorney for Parker). Parkers paid off Heider, obtained a transfer of title from Stegmann and by a replevin action obtained the truck (R. 392-3, 449-50, 755-6, 763-4, 1139-48, 1410-3, 1431-3, 1484-92; Ex. 86; R. 2186); (7) the Wardell matter. We understood that this was never actually admitted in evidence (R. 1189, 1197-8), but appellees have included it in the record. Apparently, somebody was confused regarding the location of timber on which Parker gave an option. Later, it was discovered that somebody had moved a quarter corner marker, but there was no evidence establishing that Parker had anything to do with that (R. 1184-1205, 1208-19, 1571-2).

The above is the type of evidence—comprising a large portion of the record—which was offered either to show that Stegmann was an agent or that the parties were conspirators, or perhaps for other purposes. It was obviously all inadmissible. The only suggestion in the record of a possible basis of admissibility was a suggestion that it showed "intent" (R. 1189, 1249).

Evidence of Extraneous Transactions Was Clearly Irrelevant and Inadmissible.

It seems to us that under no theory whatever could the evidence of these various transactions, some taking place long before the one here involved, be admissible for any purpose. On several occasions we objected to the testimony (R. 1008, 1023, 1066, 1162, 1189, 1242-3, 1246-9), and the court noted our objections. At one point, upon our repeated objection of evidence of conversations and transactions when Parker was not present, the Court said, "You do not have to make that objection anymore, Mr. Jaureguy, I will assume that you make it" (R. 1066). Sometimes the Court stated that the evidence was being admitted provisionally (e.g., 1189), subject to being connected up, but on two occasions intimated that it might be admissible to prove "intent" (R. 1189, 1249).

To the general rule that in order to prove a wrongful act, evidence of other acts and transactions are not admissible, there are, of course, well-recognized exceptions, applicable in both criminal and civil cases. The leading case in Oregon is *State v. O'Donnell,* 36 Or. 222, 61 P. 892, where five exceptions are set forth.

But whether the evidence was offered for the purpose of proving intent, or motive, or anything else, the authorities are uniform that, in addition to other well-defined requirements, the evidence offered must be of some act or transaction which is in some way related, or at least similar (and in such case only to prove knowledge), to the particular transaction involved.

The following are illustrations: *Boord v. Kaylor,* 100 Or. 366, 376-7, 197 P. 296, 299-300 (Evidence rejected as simply "an attempt to show that because a jury had found that he made false representations to Mrs. Cline it was therefore probable that he had been guilty of like representations in the present instance."); *State v. Willson,* 113 Or. 450, 459-98, 230 P. 810, 233 P. 259-272, on rehearing (Reviewing many previous decisions. In prosecution for unlawful abortion, the Court held that evidence of prior abortions inadmissible since there was "nothing in the testimony to show that the several alleged abortions constituted an inseparable transaction," 113 Or. at 467, 233 P. at 262); *Union Central Life Insurance Company v. Kerron,* 128 Or. 70, 79-80, 264 P. 453, 456-7 (To prove fraudulent representations of mortgagee regarding commissions and other charges, the trial court had admitted evidence of similar fraudulent representations to others which was offered to prove "knowledge and a fraudulent system practiced by plaintiff agent." The court in affirming, noted that such evidence is admissible when it consists of "fradulent acts similar to those charged, and done at or near the same time"); *Terry v. United States,* 7 F. 2d 28, 30 (9th Circ. Cal.). (Conviction for conspiracy to violate National Prohibition Act reversed because of admission of evidence that defendant earlier participated in another, but similar, conspiracy); *Crowley v. United States,* 8 F. 2d 118, 119 (9th Circ. Cal.). (Same as preceding case except that inadmissible evidence was of arrest of defendant and seizure of liquor in his possession seven months prior to the alleged conspiracy); *Tedesco v. United*

States, 118 F. 2d 737, 739-40 (9th Circ. Or.) (In prosecution for violation of Mann Act, evidence that defendant took another woman to same house of prostitution to work there held admissible to prove knowledge and intent, as against contention that prior act was not sufficiently "similar"); *Weiss v. United States,* 122 F. 2d 675, 684-5 (5th Circ. La.) (Holding that the rule in fraud cases is the same in civil as in criminal cases, citing *Wood v. United States,* 16 Pet. 342, 10 L. Ed. 987); 2 Wigmore on Evidence, 3rd. ed., sec. 302.

And if the purpose of the evidence was to prove that Stegmann was an agent of Parker, there is likewise an insuperable objection to its being considered as such. For agency cannot be proven by acts or declarations of an alleged agent, unless the alleged principal has acquiesced in the claim of agency. *Bartnik v. Mutual Life Insurance Co.,* 154 Or. 446, 448, 60 P. 2d 943 944; *Hitchman v. Bush,* 195 Or. 640, 642, 247 P. 2d 211, 212. Nor can agency even be proven by acts of the agent *plus* his declarations that the acts are pursuant to an agency. *First National Bank of Prineville v. Conroy,* 127 Or. 302, 307, 272 P. 271, 273.

Alleged Acts of Parkers Claimed to be Attempts to Defraud Plaintiff Pursuant to Conspiracy.

The findings, as we already have explained (supra, 4-5), state that the alleged conspiracy was formed on or about August 16, 1951, after defendants Parker and Stegmann are said to have learned of the alleged defect and also "that plaintiff had not discovered the defect of

title," that is, after Parker obtained the title report showing title free from the claim of the United States.

The Court's opinion makes it rather clear that there were two items of evidence, particularly, which persuaded the Court to find against the Parkers' contentions in practically every instance where there was contradictory evidence, and to conclude that the issuance of the policies was the result of a conspiracy and of fraud (R. 108-9). Although, as we shall presently attempt to demonstrate, the evidence is clear that there was neither conspiracy nor fraud but that the Title Company's error was entirely its own fault, we pause here to mention these two instances.

The first of these (R. 108) was the alleged incident testified to by two forest service employees that Parker and Stegmann went to the Parkdale Ranger Station on the evening of August 13, being later on the same day that Parker ordered the title report, and there examined the records concerning the Winans property and were told "that the title to this property was in doubt." We already have pointed out (supra, 16-7) that it was seventeen months later before the two forest rangers were called upon to identify these two men, and that Parker vigorously denied that he was there at that time and Stegmann testified that he might have been there, but not with Parker.

The Court's opinion (R. 108) then says that "Even more significant is the date of August 18, 1951." This is the evening that, admittedly, Stegmann exercised the option, giving a check of $4,000 as the option required.

Stegmann (R. 718, 1532-40) and Parker testified that shortly thereafter Parker arrived and Parker testified to a later conversation with Winans during which Winans attempted to find the title policy issued to his sister, saying nothing of the former settlement with the title company, and they had a general conversation (R 264-6, 275-86, 344-51). That Parker was there that evening was corroborated not only by Stegmann, but by his brother (R. 1250-2, 1259-61, 1265-6).

On the other hand, as the court's opinion points out (R. 108-9), Winans denied there was any such meeting and was corroborated by two employees of the Army Engineers. But the extent of the testimony of these two engineers was only that they waited outside Winans' office while Stegmann transacted some business within the office, that they then went into Winans' office and obtained checks in payment of services, and believed that when they left the office, they didn't see Stegmann or his brother there, nor Parker (R. 1041-4, 1663-4).

However, not only was this seventeen months after the date of the incident testifed to, but while one of these two witnesses testified that only Stegmann and Winans were in his office while they waited outside (R. 1662-3) the other one testifed that "we were waiting outside while Mr. Stegmann and this other man with him were in a conference with Mr. Winans in his office" (1038); when they left it was getting dusk, about 8:00 o'clock (R. 1664) and neither of them was really at all certain that the others had gone at that time—"No, I don't believe they were there. Never saw them (R. 1664).

What to us is even more important is the entire absence of motive for Parker or Stegmann to testify falsely regarding the events of that evening, as it is claimed they did. It is claimed that Parker tried to conceal from Winans the fact that he was an undisclosed principal in the transaction (F. 38; R. 138) and one of the principal contentions is that Parker learned from Winans about the claim of the government. If there had been any motive to deceive on the part of Parker as to whether at this or any other particular time he was with Winans, the motive would be to claim that he was not.

The testimony of the various witnesses regarding the above controversy as to whether Parker was with Winans the evening of August 18 is set forth in Appendix B.

Object of Alleged Conspiracy.

The findings say that the conspiracy was one "to defraud the plaintiff by inducing the plaintiff to issue to defendants Parker a policy of title insurance on said property in an amount greater than its actual value and to collect the amount of such insurance from the plaintiff on account of the failure of title to Lot 2" (F. 35; R. 136).

Each of the title policies, that is, the purchaser's policy and the owner's policy, was in the amount of $125,000. As is the custom with title companies in Oregon, there was no attempt to segregate these values in either policy as between Lot 1 and Lot 2.

The option was for $100,000.00 and the Parkers testified, although the trial judge said he did not believe

them (R. 111-2), that they paid $25,000.00 for the option. This would total $125,000.00; and, apparently, Parker merely added the two sums together and deducted a $4,750.00 refund, and in later negotiations with the Title Company advised the company that the actual net amount paid was $120,250.00. Of course, the amount paid for property is only one item of evidence of value.

In purchasing insurance on property the aim, as almost everyone knows, should be to set the amount at a sum which will indemnify the insured against any possible loss. The loss will depend not upon the cost of the property, but upon its value at the time of the loss. There is certainly no rule of law or morals that says that a purchaser of property should not obtain title insurance in an amount greater than the purchase price of the property insured.

At the time that the findings say the above conspiracy was formed, that is, on August 16, 1951, the title report had been obtained but the purchaser's policy had not been ordered, nor had there been any representations to the Title Company respecting the value of the property. (However, the Title Company's agent testified that Parker had advised that the value of the property was approximately $50,000.00 R. 194.) The title policy, as we have pointed out, was ordered on August 30, just one day after the Title Company had seen the option with its designated price of $100,000.00 (supra, 14-5). This was also ten days after the meeting with the board of directors of Multnomah Plywood Corporation where the tentative deal for a sale at $180,-000.00 was discussed (supra, 13-4), and six days after the

meeting in the office of the attorney for the Plywood Company at which he was directed to draft the contract for a sale at that price (supra, 14). Insofar as the amount of the policy was concerned, the mistake, therefore, was in not designating $180,000.00 instead of the $125,000.00 that was specified.

Although the objective of the alleged conspiracy is said to have been to obtain a title policy "in an amount greater than its actual value," there is no finding as to what the actual value was. There is a finding that defendants Winans had placed a valuation of $80,000.00 on Lot 1 alone (F. 16 and 36; R. 125, 137). Plaintiff's own evidence, however, is that the timber on both lots was worth only $45,172.00 (Ex. 19; R. 1088-97, 1932-5). The evidence is that the timber on Lot 2, being the lot with the defect in title, had a value of approximately twice that on Lot 1 (R. 1303-4, 1933-4), so that if Winans' valuation was correct, the value of both lots was $240,000.00—not the $180,000.00 for which Parkers believed they were to sell it to Multnomah Plywood.

It was this very sale to Multnomah, it will be recalled, that caused Parker to order the purchaser's policy (supra, 14-5). Further, as we have pointed out, two witnesses, both of whom had acted on behalf of Multnomah Plywood, gave it as their opinion at the trial that the property was worth the $180,000.00 which the Multnomah directors had proposed to pay for it (R. 1297-1306, 1330-4).

Of course, the amount which the insured in a title policy may recover in event of loss is not fixed either

by the original cost, or by the face of the policy or by the insured's own estimate of value, or by the actual value at the time the policy is issued. The amount to be recovered depends upon the actual value of the property at the time of the loss, not exceeding the amount of the policy.

Alleged Acts Pursuant to Conspiracy.

The findings further state that "pursuant to said conspiracy" Parker represented to plaintiff that the assignment from Stegmann was the basis of his interest in the property, that he had purchased the option for $25,000.00, that the value of Lot 1 was $35,000.00 and the value of Lot 2 was $90,000.00. It says that all these representations were false, and the assignment of the option "was a sham" (F. 36; R. 136-7).

We are still entirely in the dark as to what reason the Title Company claims any of the above could possibly have induced it to refrain from making an adequate and full search of all records bearing upon the title. If we are to assume, as apparently we must, that sometimes Appellee Company made a careful title search and sometimes its work was indifferent and sloppy, one should think that the larger the policy, the more careful the search.

But if we should accept the hypothesis that there was an exaggeration of value upon which the Title Company relied to its detriment, we again call attention to the facts (see supra, 14, 49) that the company's file on this order stated, albeit erroneously, that the value was

$50,000.00 (R. 194, 1877-8), and that prior to the order for the policy, the company also examined the option showing the selling price to be $100,00.00.

The findings further state that pursuant to the conspiracy defendants Parker "wilfully and intentionally concealed from and failed to disclose to the plaintiff their knowledge respecting the defect in title to Lot 2," knowing that plaintiff had failed to discover such defect (F. 37; R. 137-8).

We think we have covered this subject already. Even if it be assumed that the Parkers knew of this claim of the government, which is denied, to say that a layman, entirely ignorant of the law of real property titles, is required to tell a title company that he has been told somebody claims the title, to us is preposterous, as is the argument that when receiving a title report showing clear title to such property the applicant should believe that it is the title company, who presumably searched the records, that has made the mistake, not somebody else, who presumably did not.

The next statement in the findings of what was done "pursuant to said conspiracy" and in furtherance thereof, and "for the purpose of preventing plaintiff from learning of such title defect from the Winans family" was that they "concealed from the Winans family the fact that defendants Parker were the persons negotiating for the purchase . . . and were obtaining title insurance on such property." That is, it is fraud for a person to be an undisclosed principal.

If plaintiff wanted to know anything "from the Winans family," all it had to do was to inquire of them. Before ordering the purchaser's policy, Parker, as we have related, sent to the Title Company, through his attorney Ferris, Winans' homemade option (supra, 14-5), which warned that "The Seller" was not really giving assurances respecting the title but was only agreeing to convey "all the right, title and interest of The Sellers." But despite this information furnished the Title Company, it apparently now contends that if Winans (who previously had obtained a title policy from a title company and collected upon it, not in connection with any sale, without advising the title company concerning their information of the defect (R. 878-9)) had known that the Parkers were the principals, and were ordering title insurance, the Title Company would have someway learned something that would have caused it to examine all the public records bearing upon the title to this property, instead of just some of them.

Along the same vein, it is objected that the Winans "and their attorney did not discuss the description of the reserved acreage with the plaintiff because of defendant Stegmann's objection" (F. 38; R. 138).

This contention is gleaned from testimony that when Stegmann, Winans' attorney and a surveyor or two were endeavoring to reduce to writing an oppropriate description of a rather irregularly-shaped piece along the lake shore being reserved from Lot 1, somebody suggested that maybe the Title Company could help them with this description. Stegmann expressed the view that the

Title Company could not help them on a matter of that kind, his idea being that this was the job for an engineer or a lawyer, not for a title company (R. 1561-2).

The thought apparently is that if there had been one more approach to the Title Company—in addition to the several times that Parker had been there—it might have been induced to take another look into the title. Aside from the fact that Parker had no connection with this at all, we consider it to be really frivolous. It disregards the evidence of two of the Title Company's witnesses, one of them Winans' attorney, Vawter Parker (no relation), that prior to the final payment of the purchase money, they believed that appellants Parker were getting title insurance (R. 962-3, 995-6).

The morning that the deed was delivered, Winans' attorney Parker inquired at the Title Company's office whether they had insured this property, and was told that they had; but he could not recall at the time of trial whether this conversation was before or after the money had been paid and the deed delivered (R. 997-8). There is no suggestion in the evidence of any reason for any such inquiry *after* the sale was completed.

4. Additional Facts Proving Lack of Intent to Defraud

With all due respect to the learned trial judge, this case simply does not have the earmarks of an attempt to defraud a title company. The findings say that Parker knew for a long time prior to the day he ordered the title report that there was a claim of defect (F. 30;

R. 134). With this knowledge, according to plaintiff's theory, he decided to pay out $100,000 on the chance he could collect a portion of $125,000 from the Title Company—and delivered the Title Company the option showing that only $100,000 was being paid the seller for this and other property. Before doing this, however, according to the Company, he had told them that the value of all the property being purchased was $50,000 (R. 194-5).

It must also not be overlooked that before obtaining the title report Parker, as all parties agree, had started his negotiations for a sale of the property, involving, among other things, a cruiser going to the property from Eugene, a distance of probably 200 miles, or more, each way (supra, 12-4).

A person deciding to defraud a title company would not have ordered a title *report,* as both the findings (F. 30; R. 128) and the Title Company's employee said Parker did (R. 209); he would have ordered a title insurance *policy*. In ordering that policy he would immediately have specified the amount of the policy (and, in case of doubt, the maximum possible amount)—not have given the impression that it was to be $50,000.00 as it is claimed he did in this case (R. 194-5). And if a report only were ordered, when presented with it and learning that it showed good title he most certainly would not have told the company that he didn't know when, if ever, he would order a title policy or the amount thereof (R. 206-7, 209-10). That is, he would not have waited for another two weeks or more before

getting a definite contractual obligation from the company, for a definite amount.

If he paid $25,000.00 (which, if he were gambling on the chance a title company would make a mistake, he probably would not have done), it would have been *after* receipt of the title report and in reliance upon it, not before. He most certainly would not have permitted negotiations for a sale to drag along for several weeks; or have arranged that the purchase price could be paid to him over a long period of time, as Parker did here. In fact, he would never have gambled $100,000.00 at all, but only $1,000.00, i.e., the purchase price of the option. After spending that sum, he would have made a prompt sale of that option, for cash, obtaining for the purchaser a $180,000.00 purchaser's policy, and then made a speedy get-away.

And if, as the Title Company apparently contends, Parker knew enough about all these things to think he could defraud a title company, he most certainly would not have sent that company the option, with its red-flag warning (R. 31), before obtaining a policy.

And none of this would have been done personally by him. He would have followed the course which 90% or more of purchasers follow, of having his agent, an attorney or real estate man, handle all negotiotions with the Title Company, preferably by correspondence.

The court undoubtedly has observed the dilemma in which the Title Company is placed. The skulduggery on the part of Parker which counsel think they discover, started, they claim, long prior to the receipt of the title

report (F. 28 to 30; R. 133-5). It started at the beginning of Stegmann's negotiations with Winans, early in July. The alleged deception by Stegmann of his role, the segregation of the property into the $35,000 tract and the $90,000 tract, the "fantastic story" of the loans long before from Parker to Stegmann—all these alleged wrongdoings were *prior* to the receipt of the title report. But to say that before the Title Company was approached, these loggers had a premonition that it, through negligence, would fail to discover this alleged defect, which an inspection of public records would reveal, is just going too far—even for appellee Title Company.

So they say, inconsistently, that this "conspiracy" did not start when the negotiations began in July (F. 15; R. 125) when Stegmann is claimed to have learned that the title to a portion of the property was bad. It had not even started when the $1,000.00 option money was paid, or when a cruiser was hired to come 200 miles to cruise the property. The conspiracy is claimed not to have started until they learned that the Title Company had made the Great Mistake.

5. Alleged Defense of Failure to Notify Company of Defect

The next contention of the Title Company, upheld by the Trial Court, is that there was a failure of Parker to comply with the following provision of the purchaser's policy:

> "Upon receipt of notice of any defect, lien or encumbrance hereby insured against, the insured shall forthwith notify the company thereof in writing."

The contention and also the court's finding are that at the time Parker receiver his purchaser's policy on September 4, 1951, he "knew of the defect in title" and failed to give notice thereof to the Title Company prior to September 11, when final payment was made and that such failure constitutes a defense to the action of the *owner's* policy, issued later (F. 42; R. 139-40).

This contention prompts us to call attention to some recent apt observations of the California District Court of Appeal for the 1st District, in *Overholtzer v. Northern* Counties Title Insurance Co. 116 Cal. App. 2d 113, 253 P. 2d 116. That case concerned an insured who, like Parker, had unbounded confidence that the Title Company did not make mistakes in searching records. So he did not report to the company that his neighbor had orally stated that he had an easement over the assured's property.

"Under such circumstances," Justice Peters said in giving the court's opinion, "the title company should not be permitted to avoid liability on technicalities or upon a literal interpretation of an isolated clause of the policy that is qualified by other clauses. Title insurance policies should be interpreted in the same fashion as are other insurance policies, that is, liberally in favor of the insured, and against the insurer." Particularly is this so, he said, because "Title insurance is practically an unregulated business. No state control is exercised over the terms of the policies or over rates" (253 P. 2d at 120).

But in addition to the above, we submit the following answers to the Title Company's contention:

(1) It will be noticed that there is no claim made that between the time of the issuance of the purchaser's policy and the payment of the entire purchase money, any notice of any kind was obtained by either of the Parkers with respect to the claim of the government, or of any other alleged defect. Apparently the Title Company wishes the court to construe "upon receipt of notice" as including information which they claim Parker obtained *prior* to the issuance of that policy. This is a plain distortion of the English Language.

(2) The words "receipt of notice" mean something different than vague or uncorroborated information which may have come to one's attention. Webster's dictionary defines receipt as: "Act of receiving; also, the fact of receiving or being received. 'At the *receipt* of your letter.' "

Obviously. it was not intended that an insured must advise the company, for instance, that his friend Jones says that the insured is not the owner. "Notice" when used in this context, upon which such important consequences depend, can only mean, as it does in other important contexts, "information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source . . .," to quote *Lauderback v. Multnomah County,* 111 Or. 681, 693-4, 226 P. 697, 701 (involving required notice of road proceedings.) quoting 2 Pomeroy's Equity Jurisprudence, 3 ed., sec. 594.

The letter which Parker received from the government (Ex. 102; R. 2207-8) a few days after obtaining his

owner's policy is the type of "notice" of a defect comprehended by the policy.

In *Hoffman v. Employers Liability Corporation,* 146 Or. 66, 29 P. 2d 557, a liability policy provided that, "upon the *occurrence of an accident* covered by this Policy the Assured shall give immediate written notice thereof." (Italics added). The insured's superintendent of construction one morning observed that a barricade had been knocked down and "was informed that some woman had fallen over the barricade the evening before, but who she was or the extent of her injuries, if any, was unknown to his informant" (146 Or. at 69, 29 P. 2d at 559). No notice was given to the insurance company for a year following the accident.

The trial court, upon these facts, concluded that the superintendent's "information as to the happening of the accident was so indefinite and uncertain in its nature as to constitute no notice to plaintiff that an accident covered by the policy had happened" (146 Or. at 82, 29 P. 2d at 564). The Supreme Court, two justices dissenting, affirmed the judgment for the insured.

The above case, it should be noticed, provides that upon the *mere occurrence* of an accident, written notice to the company was to be given; whereas here it is only "upon receipt of notice" of a defect of title. There was no such receipt of notice until Parker received the letter from the government.

3. The Parkers' claim against the Title Company is not based upon the *purchaser's* policy, but upon the *owner's* policy, obtained September 14, 1951. As we have

set forth above at quite some length, there was no duty on the part of the Parkers to pass on to the Title Company information they may have obtained prior to the issuance of the policy. So, even if this court should agree with the Trial Court that such information had been obtained by the Parkers before they obtained their owner's policy, such fact would be no defense.

6. Alleged Defense of Misrepresentation in Negotiations for Settlement

The next, and final, alleged defense which the court found had been proven by the Title Company was that in connection with settlement negotiations Parkers "represented to the Title Company that they had paid $120,250 for Lots 1 and 2 when, in fact, they had only paid $95,250.00" (R. 115, 140). This, in the court's opinion, was "a material misrepresentation made with intent to defraud the Title Company and it may avoid the policy on that ground."

The difference between the amount represented by Parkers to have been paid and the amount which the court found actually was paid, that is the sum of $25,000, is represented by the check which the Parkers and Stegmann testified was given to Stegmann on August 13, 1951, in payment for the option. The evidence which the court felt overcame the direct testimony of the delivery of the check as consideration for the option was entirely circumstantial. Apparently, the principal item of this evidence was the fact the check was not cashed,

being returned to the Parkers after the government advised them of its claim.

To us it would seem that if two persons concoct a scheme to convince others that a check represents an actual transfer of money, when it does not, the one thing they would not *fail* to do would be promptly to cash the check. But be that as it may, it is very clear that if there was falsification as to the amount paid by Parkers for the property, this is no defense to payment of the policy. This alleged defense, it should be noted, is not based upon any provision either in the policy or in Oregon statutes; but we venture to prophesy that the decisions, if any, to be cited by the Title Company's attorneys on this point will be based upon policy provisions, or statutes, or both.

There are, of course, a large number of decisions on the effect of "false swearing" as a defense in insurance cases. But these cases, almost if not entirely without exception, involve *fire* insurance policies. Almost from the beginning, in this country at least, provisions in fire insurance policies, mostly based upon the statute, have provided that any false statement made in proofs of loss or false swearing upon examinations provided for by such policies, constitutes a defense. In the absence of such policy provisions, there is no such defense.

> "Fraud and false swearing in proofs of loss are only a defense if the policy itself contains a stipulation to that effect." *Blair v. National Security Insurance Co.* 126 F. 2d 955, 960 (3d Circ.)

It is rather surprising that more cases are not found on this point, but although in some of the numerous

cases little reference is found to the policy provisions, in all of them that we have been able to discover the basis is actually such a provision in the policy. Oregon cases, which are illustrative of those from other states, are *Fowler v. Phoenix Insurance Co.,* 35 Or. 559 559-60, 57 P. 421, 422; *Willis v. Horticultural Fire Relief,* 69 Or. 293, 296, 137 P. 761, 762; Ann. Cas. 1916-A, 449; *Ward v. Queen City Fire Insurance Co.,* 69 Or. 347, 351-2, 138 P. 1067, 1068.

The Oregon statute involving fraud and false swearing as a defense in fire insurance policies, is not an unusual type. But, while perhaps only remotely relevant here, we may call attention to the fact that even though what is claimed to have happened here had taken place in a fire insurance case it would not even there be a defense. Our statute, passed in 1907, now ORS 744.100, provides that every policy shall contain a provision that it shall be void if "the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof . . . or in case of any fraud or false swearing by the insured relating thereto."

The above is also the identical statutory provision in the State of Washington. In *Briggs v. Madison,* 195 Wn. 612. 82 P. 2d 113, the insurance company defended under a policy with the above provision on the ground of false swearing, but the evidence showed only that the insured "testified falsely as to payment of the full amount of the purchase price." Since, as the court pointed out, the policy provision "relates to false statements

made in connection with proofs of loss and value of the property" and accordingly "any statement, true or false, respecting the consideration paid for the property has no bearing on the issue" (82 P. 2d at 116-7).

CONCLUSION

For the reasons herein stated, the judgment in favor of appellee Title and Trust Company cancelling the owner's policy issued to Chet Parker should be set aside and a judgment entered for Parker for the amount of his loss. In view of the testimony as to the value of the timber only, $180,000.00 on both tracts, and of the expense to be incurred in logging the small remaining tract (R. 504-7), it would seem that his loss is at least $125,000.00 and that judgment should be entered for that amount, plus interest.

We assume that the case will then be remanded to the Trial Court with directions to take evidence on the reasonable value of attorneys' services rendered Parker in this action on the policy, so that judgment may also be entered for that amount, pursuant to the Oregon statute (ORS 736.325).

Respectfully submitted,

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THE WINANS' JUDGMENT AGAINST APPELLANTS PARKER

This portion of the brief is devoted to the appeal by the Parkers from the judgment for $9,000.00 against them in favor of the five appellees Winans. The jurisdictional statement already given covers this judgment, the jurisdiction being based on diversity of citizenship.

STATEMENT OF THE CASE

In the interest of conserving space, attempt will be made to avoid repetition of the facts already given which have a bearing upon this portion of the appeal. It should be sufficient here to say, by way of summary, that Ethel and Paul Winans gave appellant Stegmann an option to purchase real property, that this option was assigned to appellant Chet L. Parker, who eventually obtained a deed, and that there is evidence in the case, which, though denied, was believed by the trial court, that both Stegmann and Parker had been advised by Winans of a claim of the United States Government to that portion of the property that has been referred to as Lot 2.

The contention of the Winans, upon which the judgment in their favor is based, is that in subsequent negotiations with appellant Title and Trust Company to recover upon a title policy the Parkers stated to representatives of that company that they had not been advised concerning the above title defect and, in fact,

that they had been told by the Winans that the Winans had good title. The finding on this latter point was, rather, that the Parkers "by their words and conduct wilfully and intentionally induced the plaintiff to believe" that Winans had represented that they had good title (F. 43, R. 140-1).

A finding further states that these representations were made with knowledge that the Title Company would institute legal proceedings against the Winans who thereupon "would be subject to adverse publicity in Portland and in Hood River" (F. 46, R. 142). We believe it to be a fact that, beyond doubt, the conferences at which these statements were claimed to have been made were largely for the purpose of obtaining evidence for that lawsuit. See particularly the testimony of Mr. Buell, the Title Company's attorney (R. 1772-3, 1796). The same finding further states that in the original complaint in this case it was charged that the Winans did not disclose to Parker and Stegmann the Government's claim of ownership or the settlement which they had theretofore made by reason of that claim on a title insurance policy which had ben issued to them, and also that they falsely represented they were the owners of a marketable title to Lot 2.

We call particular attention to the fact that the findings do not state that the complaint which was then filed had any allegations of false representations by the Winans *to the Parkers* (See F. 46; R. 142), and that that complaint itself, which is in evidence (R. 2241-5), makes no such charge.

The findings further say that these false misrepresentations made by the Parkers to the representatives of the Title Company "were largely responsible for the inclusion of third party defendants Winans as defendants" (F. 47; R. 142-3) and that the charges made in the complaint "were copied and published by a newspaper at Hood River, Oregon" (R. 142).

SPECIFICATION OF ERRORS
(Winans' Judgment)

The specification of errors hereinbefore set forth in connection with the Title and Trust Company's judgment (supra, 6-9) were directed to findings number 1 to 43, inclusive, and we resume here at that point, the following specifications having reference to the Winans' judgment.

The court erred in finding:

That the Parkers represented to the Title Company that the Winans had not divulged to them any defect in the title to Lot 2 or disclosed their knowledge of the claim of the United States or induced the Title Company to believe that the Winans had represented themselves to be the owners of Lot 2 and to have good title (F. 43, R. 140-1); that said alleged representations by the Parkers constituted slander against the Winans or imputed to the commission of a crime (F. 45, R. 141-2); that said alleged representations by the Parkers to the Title Company were made with knowledge that the result would be to require the Winans to incur expenses in

defense of legal proceedings and to clear their names and reputations of false imputations, that the original complaint in this case charged that the Winans falsely represented to the Parkers that they were the owners of marketable title to Lot 2 (if that be the intented purport of said finding) or that it charged that none of the Winans disclosed to the Parkers the claim of ownership of the United States, or the settlement of the policy of title insurance issued to the Winans, or that any such charges were copied or published by a newspaper in Hood River County, Oregon, or given wide circulation in that county; or that any such representations were the result or in furtherance of any conspiracy in which the Parkers were parties (F. 46, R. 142); or that any representations by the Parkers to the Title Company were responsible for the inclusion of the Winans as defendants in the original action; or that such action or the publicity which it received caused any legal injury or damage to the Winans in any respect whatsoever (F. 47, R. 142-3); or that as a result of any falsehoods on the part of the Parkers that the Winans were damaged in the sum of $9,000 or any other sum (R. 143).

The court also erred in its Conclusions of Law that the Winans were entitled to judgment against the Parkers for $9,000 (C.V.); and that the cross claim of the Parkers against Winans should be dismissed (VII) and that the third party defendants were entitled to judgment for costs against the Parkers (R. 144-5).

The court also erred in granting judgment to the Winans against the Parkers for $9,000 together with costs and disbursements (R. 149).

SUMMARY OF ARGUMENT
(Winans' Judgment)

Even though the facts were as claimed by the Winans and found by the Court, there would be no liability. What the Parkers are claimed to have done may be characterized either as (1) instigating a groundless suit against the Winans, or as (2) consulting with attorneys respecting evidence to be furnished for a prospective lawsuit. In the former case, the rule is applicable that one who instigates a malicious civil prosecution against others is liable to the same extent, but not more, than the party who files such a wrongful action, and in Oregon there is no liability in such case. In the latter case, the statements made by the prospective witnesses with respect to the testimony is, in Oregon, absolutely privileged. Our third legal contention is that the statements alleged to have been made by the Parkers to the Title Company did not constitute slander.

But we shall show that the evidence does not support the finding that any statements were made by either of the Parkers to the Title Company's representatives regarding alleged misrepresentations by any of the Winans respecting their title; that in the original complaint there was no charge that the Winans had misrepresented anything to the Parkers, nor, as is contended, was there any publicity given to any such charges.

Finally, the only damages sustained by the Winans, for which the court found they were entitled to recover, consisted of attorney's fees in defending and prosecuting

this case. This is not an element of compensable damages.

ARGUMENT

The charge against the Parkers is, as already stated, that they represented to the Title Company that "the third party defendants," i.e., the Winans, had not divulged to them the defect in Lot 2; and also "by their words and conduct wilfully and intentionally induced the plaintiff to believe that the third party defendants had represented themeselves to be the owners of Lot 2 and to have a good title thereto" (F. 43, R 140). These statements are said to have been false and to be slanderous because they charged "third party defendants Winans" with a crime, that set forth in O.C.L.A., sec. 23-550, now ORS 165.220, of falsely representing to be the owners of property and executing a conveyance with intent to defraud (R. 141-2). It is further said that these false representations were responsible for the inclusion of the Winans as defendants (R. 142-3) and that the Winans have suffered damages in the sum of $9,000.00 (R. 143). The court's opinion and findings are clear, as we shall show, that the $9,000.00 was awarded the Winans because of attorneys' fees incurred by them in this case.

Alleged Representations by Parker Would Not Be Actionable Slander

Before going further into the facts, we shall show that the charges against the Parkers do not constitute a cause of action.

The Court's opinion says that "During the negotiations between Parker and representatives of the Title Company, Parker informed them that the *Winans family* did not divulge the defect in the title and represented that they had good title" (R. 115. Italics added.). The findings are to the same effect (F. 43; R. 140). But the evidence makes it clear that in the conferences with the Title Company's representatives the only member of the Winans family referred to as having discussed the property was Paul Winans (R. 1772-3, 1803-4).

It is well-settled in Oregon, as elsewhere, that the categories of actionable oral defamatory statements are much more restricted than in the case of written statements. (See, e.g., *Reiman v. Pacific Development Society,* 132 Or. 82, 87-8, 284 P. 575, 577.) Without here detailing them, it is sufficient to say that in this case the Winans alleged, and the court found, that these alleged representations were slanderous, and therefore actionable, because they charged "the Winans" with the commission of a crime (F. 45; R. 141-2). This alleged crime is said to be violation of O.C.L.A., sec 23-550, now ORS 165.220, which reads as follows:

> "If any person shall falsely represent that he is the owner of any land to which he has no title, or shall falsely represent that he is the owner of any interest or estate in any land, and shall execute any conveyance of the same with intent to defraud anyone, such person, upon conviction thereof, shall be punished by imprisonment in the penetentiary not less than six months nor more than two years."

The following facts are undisputed:

1. The person who claimed to own the property, and who (except for the claim of the government) had the record title, was Ethel Winans. (See title chain, R. 1890; option, R. 30-1).

2. The person who executed the conveyance was Ethel Winans (R. 27-30).

3. There is absolutely no evidence, nor any contention, that Ethel Winans ever discussed the property with the Parkers, nor any evidence that the Parkers represented to the Title Company that she had done so. It seems to be agreed that the Parkers, on the contrary, stated they did not believe she would be a party to any fraud and were surprised when shown the correspondence between her and the other title company (R. 1780-2, 1808-10, 1836).

4. It therefore follows that even though the contentions of the Winans were true, Parkers made no representations of fact which would constitute a crime; for to constitute a crime under the above statute a person must have both (1) made false representations and (2) executed a conveyance with intent to defraud.

The Statements Alleged to Have Been Made by the Parkers to the Title Company were Absolutely Privileged

As already indicated, the statements alleged to have been made by the Parkers to representatives of the Title Company were for the purpose of having the information thus given used by the attorneys for the Title

Company in bringing an action in which the Winans would be made parties defendant (R. 1772-3, 1996). Any such statements must necessarily be viewed either (1) as statements made by a prospective witness of facts concerning which he would testify, or (2) as an attempt to induce another to institute legal proceedings against another, or both. In either event, there would be no cause of action against the Parkers.

While the same considerations of policy would seem to be involved regardless of which of the above two views is taken, the two aspects of the situation will be discussed separately.

Statements Privileged as Communications Preliminary to Proposed Judicial Proceedings.

At this point we wish to call to the Court's attention the fact that in the same pleading filed by the Winans charging the Parkers (in conspiracy with Stegmann) with maliciously defaming them (R. 89), it was also charged that the Title Company in filing the original complaint not only published "false and defamatory statements" concerning the Winans family in that it charged that "the Winans family falsely represented that they were the owners of a marketable title to said Lot 2" but that these charges by the Title Company were made "wilfully and maliciously and with reckless abandon and with no endeavor whatsoever to check the truth of said defamatory statements" (R 82-3). Judgment was asked against the Title Company and the Parkers in the alternative (R. 91).

This charge against the company seems to have been abandoned and no mention of it is made in the findings. We apprehend that counsel for the Winans abandoned it because, upon further study, they learned the law of Oregon to be that such statements in judicial proceedings are subject to absolute privilege. And statements made to a prospective plaintiff preliminary to the filing of the complaint and for the purpose of furnishing information for such complaint, or as a basis of testimony to be given, are subject to the same privilege.

The latest decision of the Supreme Court of Oregon discussing this privilege as applied both to statements in the pleadings and to statements of witnesses, either at the trial or prior thereto, is *Strycker v. Levell and Peterson,* 183 Or. 59, 190 P. 2d 922. The complaint in that case alleged that the defendants "conspired fraudulently and maliciously to injure plaintiff's good name" by executing certain affidavits which were filed in divorce proceedings. One of the defendants was, and the other was not, a party in the divorce case. The affidavit given by each defendant, the Court held, "constituted actionable libel unless privileged." They were filed in support of a motion of defendant husband for modification of the divorce decree relative to the custody of the children, this motion being denied.

The Court reaffirmed the rule that pertinent and relevant matter in judicial proceedings is absolutely privileged, regardless of its defamatory character. "Neither is it material," the court said, quoting from *McKinney v. Cooper,* 163 Or. 512, 98 P. 2d 711,

"whether the defendant in making such statements was actuated by good or bad motives" (183 Or. at 67, 190 P. 2d 925). The court also referred to one of its former decisions respecting the privilege of witnesses in judicial proceedings, *Cooper v. Phipps,* 24 Or. 357, 33 P. 985, 986, 22 L.R.A. 836. The rule laid down by the court was supported, so the court held, by the Restatement of Torts, Vol. 3, secs. 587, 588. The first of these sections has reference to a party to judicial proceedings and the other to a witness, the latter reading as follows:

> "A witness is absolutely privileged to publish false and defamatory matter of another in communications *preliminary to a proposed judicial proceeding* and as a part of a judicial proceeding in which he is testifying, if it has some relation thereto." (Italics added.)

Comment "b" to the above Restatement, section 588, after stating that the rule protects a witness while testifying says:

> "It also protects him while engaged in private conferences with an attorney at law with reference to proposed litigation, either civil or criminal."

In the above Oregon case, affidavits were filed, while in the present case it is alleged that the attorneys incorporated in the complaint the substance of Parker's statements. As stated, the charge was made in that case, as it is here, that the statements were part of a conspiracy. As we have shown in another portion of this brief (supra, 37-9), such an allegation adds nothing to the case. With respect to this, the court said (183 Or. at 68, 190 P. 2d at 928):

> "The plaintiff asserts that this is an action on the case for conspiracy, but we see in it only an allegation that the defendants maliciously and falsely agreed to make and made certain libelous statements, which statements were protected under the rule of absolute privilege. The plaintiff cannot avoid the defense of privilege which appears in her own complaint by giving to a libel suit the name of an action on the case for conspiracy."

So, in the present case, whatever the Parkers said in conferences with the four attorneys—two of them their own attorneys and the other two representatives of the Title Company—was absolutely privileged. To the same effect are *Schmitt v. Mann,* 291 Ky. 80, 163 S.W. 2d 281; *Richeson v. Kessler,* 73 Ida. 548, 255 P. 2d 707, 709.

No Liability of Parkers for Causing Winans to be Sued.

As suggested above the protection afforded a party or a witness in making statements in connection with litigation is closely akin to the protection afforded a party in filing and prosecuting a lawsuit. In the one case, it is particular statements set forth in pleadings or in testimony that are claimed to injure a third person; and in the other case, it is claimed that the entire basis of the lawsuit is false and fraudulent, thus causing unjustifiable damage to the party sued.

Just as courts recognize the public interest in protecting parties and witnesses in statements they make in the pleadings, or otherwise in furtherance of a lawsuit, so also, except in exceptional circumstances to be shortly mentioned, most courts hold that a similar

privilege protects a party against liability based on claims that his lawsuit is itself false, fraudulent or malicious.

It seems clear that one who by his statements to another regarding alleged facts causes him to start a lawsuit has the same protection as the one who sues. That is to say, the Parkers, if it should appear that they caused Title and Trust Company to include the Winans as defendants have the same protection that they would have had had they themselves sued the Winans upon precisely the same cause of action—as the Title Company endeavored to induce them to do (R. 1788-90, 1799-1801, 1841-5; Ex. 7-10B; R. 1901-17). While we have found no cases exactly in point in cases involving alleged civil malicious prosecution, this is the rule with respect to alleged criminal malicious prosecution 34 Am. Jur., Malicious Prosecution, sec. 25, pp. 717-8.

In Oregon, the rule, which seems to be in accord with the weight of authority, was early laid down that in the absence of an arrest of the defendant or seizure of his property by attachment or otherwise, there is no cause of action for malicious prosecution of a civil suit.

> "Courts are ever open to litigants for the adjudication of their rights, and, although a party may have been induced by malice to institute an action, so long as he does not cause the arrest of the defendant, or his property to be attached, the costs awarded upon the dismissal of the proceedings are deemed by the legislative assembly suitable compensation for the injury suffered by the defendant in consequence of the action, and the law affords him no other remedy, for if he were permitted to maintain an action of malicious prosecution when he had

> sustained no special injury, the former plaintiff, if the action terminated in his favor, might institute a similar action, which course could be repeated; until the plaintiff won, thus rendering litigation interminable . . . If, however, the defendant has been arrested or his property attached in an action which terminates in his favor, he has sustained a special injury, which cannot be compensated by the costs and disbursements prescribed by statute, and, if such action were instituted through malice, and prosecuted without probable cause, upon the common-law theory that wherever there is an injury there is also a remedy, the defendant may maintain an action of malicious prosecution to recover the damages sustained.
>
> *Mitchell v. Silver Lake Lodge,* 29 Or. 294, 296-7, 45 P. 798.

In a later Oregon case, based on alleged malicious prosecution of a civil suit, the Court's attention was not called to the case from which the above quotation is taken, and the Court assumed that the question was still open in this state, but found in favor of the defendant on other grounds. *Hoffman v. Kimmel,* 142 Or. 397, 20 P. 2d 393.

This Court, in an appeal from the Oregon District Court, but in a case in which the Washington law applied, pointed out that the rule of the Washington courts that no cause of action exists for malicious prosecution of a civil suit, in the absence of seizure of persons or property, is "in conformity with the general thought on the subject," and affirmed the lower court's judgment for defendant. Although the "nubbin" of plaintiff's complaint was said by the Court to be "that appellees maliciously conspired to destroy its business" (138 F. 2d

at 637), no further reference to the charge of "conspiracy" is found in the opinion—obviously it added nothing to the case. *Vancouver Book and Stationery Co. v. L. C. Smith & Corona Typewriters, Inc.*, 138 F. 2d 635, 637 (C.A. Or.), Cert. den., 321 U.S. 786.

So regardless of whatever basis the Winans are endeavoring to assert for their claim against the Parkers, there is no liability.

While we think the Court will not find it necessary to go further in considering the claim of the Winans against the Parkers, we shall now proceed to show that the facts are much different than as claimed, and as assumed above.

The Evidence in the Winans' Claim Against the Parkers

We have already pointed out, and repeat here for emphasis, that there is no evidence whatsoever that in their negotiations with the Title Company the Parkers made any statements regarding the Winans which could possibly have charged them with the commission of the statutory crime set forth in the court's opinion (R. 116-7) and referred to in the findings (R. 141-2), a crime which is committed when a person after having falsely represented to be the owner of property purports to execute a conveyance thereof. Ethel Winans was the one who agreed to convey her "right, title and interest" in the property (R.31) and was the one who did convey her right, title and interest (R. 27). She was accordingly

the only one who could have committed the crime; and there is no evidence that the Parkers ever said that she made any representations, true or false, respecting her title.

The efforts to elicit testimony regarding these alleged representations which Parker claimed to have repeated to the officers of the Title Company were with respect to representations by Paul Winans, the only person who negotiated the deal. But even here there is scarcely a scintilla of evidence. The fact is that the subject did not arise during these negotiations. The Vice-President of the Title Company, himself a lawyer (R. 1803), as a witness for the Winans was very emphatic that at none of these conferences was any statement made by either of the Parkers regarding representations made by Winans (R. 1805-7). In fact, the one thing that seemed to impress him was the surprised look on the faces of the two Parkers when they were shown the correspondence, referred to above, between Miss Winans and the other title company (R. 1807-10).

Mr. Buell, one of the attorneys for the Title Company, representing the company in this case, was present at the negotiations, and could recall no such representations (R. 1772); and the same was true with respect to one of the two attorneys representing the Parkers at these conferences (R. 1859), the other one not being questioned on the subject (R. 1838-52).

The only evidence whatsoever in support of the contention that there was any such representation made was a statement made by Parker himself in his deposi-

tion, introduced in evidence as an admission; but at the trial he testified that he had no recollection as to whether or not he made any such statement to the Title Company's representatives, although he might have (R. 497-50).

While the above is the evidence showing an absence of statements by the Parkers to the Title Company's attorneys regarding representations by Winans, they and their attorneys *did* volunteer the information to the attorneys for the Title Company that Winnans had stated that his title was subject to a *defect* (R. 1785-1852). This was the statement made by Winans to Parkers' attorney, Abraham, when the deed was delivered, already related (supra, 18-9), and was the very first information which the Title Company obtained of that incident (R. 1785).

The court's opinion mentions the fact that in each of the drafts of the proposed contracts of settlement between the Parkers and the Title Company there was a recital to the effect that "the Parkers have represented to the company and hereby warrant that they had no knowledge of any defect in the title to said Lot 2 prior to their payment of the purchase price therefor and acceptance and recording of the deed to said property." The opinion states that the Parkers did not "object to the inclusion in the contract of such paragraph" (R. 115-6). This apparently is the basis for the finding that the Parkers "by their words and conduct" induced the Title Company to believe that the Winans had represented themselves to be the owners (F. 43, R. 140)

The Parkers themselves never read the contract (R. 2068-9), it being read by one of their attorneys, not audibly (R. 1833), and according to their testimony he discussed only the substantive provisions, particularly the provisions requiring Parkers to sue the Winans. Mr. Buell, the Title Company's attorney, testified to the same effect (R. 1798). At any rate, they never signed it.

The fact, referred to in the Court's opinion (R. 116), that all the negotiations were "predicated on the lack of knowledge of the title defect by the Parkers"—and, of course, they still contend that they had no such knowledge—cannot be called slander.

But if the further evidence is required that there was no discussion at the time of any of the settlement negotiations respecting any representations made by any of the Winans to the Parkers, it is to be found in the original complaint, filed November 27, 1951. The contents of that document are important not only on the question whether Winans was damaged as a result of representations made by the Parkers to the representatives of the Title Company, but also as throwing light on what the Parkers actually said to those representatives.

Since attorney Buell, who drew that complaint, testified that the Parkers had said nothing to him about any representations made by any of the Winans regarding the title, we would hardly expect him to set forth in the complaint allegations that the Winans *did* make such representations. As we shall presently show, he did not do so.

We also call attention to the fact that over six weeks elapsed between the last of the conferences and the filing of the original complaint; and that during this time the Title Company's representatives made an extensive investigation.

The day before the original complaint was filed, Buell wrote a letter to Parker's attorneys. In this letter he stated that "numerous changes of mind on the part of Mr. and Mrs. Parker . . . together with other evidence which our client has discovered, indicates to our client that the Parkers have not made a full disclosure to this company" (R. 1924). Buell also testified to the investigation that he and others made during that six weeks' period (R. 1784-5). He said that there were a "large number of important circumstances that led up to the filing of the complaint" (R. 1783). However, nobody from the Title Company interviewed either Stegmann or any of the Winans family before the complaint was filed.

Certainly there is no evidence that statements by the Parkers to the company was what induced the Title Company to bring the action, nor that any such statements "were largely responsible for the inclusion of third party defendants Winans as defendants in the original action filed by plaintiff," to quote the findings (F. 47; R. 142-3). The fact is, as the Title Company's attorney testified, they had decided to sue the Winans before they ever met the Parkers (R. 1772)

The Charges in the Complaint Said to Have Been Instigated by the Parkers

This case went to trial upon an amended complaint, but it is the allegations of the original complaint, and the resulting publicity thereof, which are claimed to have damaged the Winans. This original complaint (R. 2241-52) at no place made any charge that any of the Winans falsely represented anything to the Parkers. But, although no representatives of the Title Company ever talked to Stegmann, or for that matter to any of the Winans, until subsequent to the filing of the complaint, the complaint did allege that Paul and Ethel Winans "falsely represented to *defendant Walter Stegmann* that they were the owners of a marketable title to said Lot 2." (R. 2246. Italics added.)

It is thus clear that these charges of misrepresentations (by Winans to Stegmann) made in the original complaint were not based upon any direct evidence thereof. Rather, Buell, as he testified, "was relying primarily on the option itself, which I considered to be a representation of marketable title, . . ." (R. 1772-3).

While it is alleged in this original complaint that neither Ethel nor Paul Winans disclosed to the Parkers the facts regarding the claim of ownership of the United States, it is also alleged that before they obtained the Owner's policy of title insurance the Parkers, as well as Stegmann, knew about the claim of the United States (R. 2249).

Of course, the amended complaint filed more than thirteen months after the original, and also the third

party complaint also filed by the Title Company, had many other contradictory contentions. Among other mutually contradictory allegations, that complaint alleged that the Parkers knew all about the claim of the Government when they applied for a title report (R. 12), that the Parkers relied upon Stegmann's representation that he had "a good and sufficient option to acquire title" to the property, but that both Parkers and Stegmann were mutually mistaken (R. 17), but also that Stegmann knew the title was unmarketable but falsely represented to the Parkers that it was a good title (R. 18).

Publicity in the Newspapers

The court found that the action received publicity in the newspapers and (although the opinion did not mention this, R. 115-6) that this publicity caused damage to the Winans (R. 143). However, there is nothing in the publicity that even hints that the Winans made any misrepresentations to the Parkers. One of the two articles published subsequent to the filing of the complaint quotes the allegation of the complaint, referred to above, to the effect that "Winans falsely represented to *defendant Walter Stegmann* that they were the owners of a merchantable title" (R. 1931). The news article also stated that "The complaint states that the Winans, Stegmann and Parker all knew of the title difficulties and did not tell the Title and Trust Company" (R. 1931). (Italics Added) Certainly this does not suggest that the Parkers had slandered the Winans.

The only other newspaper article in evidence published after the complaint was filed (R. 2276-7) makes no derogatory statements whatever about the Winans.

Winans Did Not Suffer Damages

It is charged in the complaint of the Winans against the Parkers that as a result "of said conspiracy and of the false and defamatory statements" the Winans "have been damaged in their reputation and in their business and have been exposed to ridicule, contempt and disgrace" and it is also said that as a result thereof they were "forced to retain and pay for the services of attorneys to defend them in the present action" (R. 90).

In addition to stating that the representations of the Parkers to the title company attorneys were "largely responsible for the inclusion of third party defendants Winans as defendants in the original action" (R. 143), a charge which we have already discussed, the findings are to the effect that the charges "were copied and published by a newspaper at Hood River, Oregon" (R. 142) and that the "defendants Winans" were damaged "in that it not only required them to expend their own time in the preparation and trial of this case but also required them to employ and pay for the services of attorneys to represent them in said action" (R. 143).

The findings also state that as a result of the publicity two of the five Winans, that is Paul and Linnaeus, were damaged because the action and publicity resulting therefrom made it more difficult for them "to obtain credit in connection with their respective businesses" (R. 143). But the evidence does not sustain any of the

above statements.

As we have already pointed out, nothing in the newspaper publicity could possibly have been the result of any statements made by the Parkers to the Title Company. Furthermore, it wasn't the details of the allegations in the complaint but the fact of the publicity of the Winans having put over this deal that caused the talk around the town, and this was disclosed by newspaper articles long prior to the filing of the complaint (R. 1925-7, 2274-5).

There were four witnesses who testified for the Winans regarding the effect of the publicity on their reputation, their testimony being almost entirely confined to Paul Winans, or "Mr. Winans." One of them said that "since the first of the year we have required substantial collateral for all of the loans we have against the Winans" (R. 1680), but that this was just because he was a defendant in a law suit, not because of the particular charges (R. 1682-3).

Another one was asked whether he had read the articles "regarding the filing of a suit for false and fraudulent representations" (R. 1685), and he said "as a result of that lawsuit" it would be necessary for him to have some money sooner than otherwise would be the case in connection with a house he was building for "Mr. Winans" (R. 1687). But here again it was merely the fact that a lawsuit was filed against Winans that caused him to take this course (R. 1691). In fact, he stated that he didn't believe any of these charges—"I would not believe any editor or anybody else until

a case like this was completed, until I saw the end of it" and regardless of who it might involve "I still would have disbelieved it" (R. 1693).

The County Judge was also called as a witness by the Winans. He went into a little more detail. He had heard people talk about the Winans both before and after the lawsuit was filed. Even before it was filed, some of them thought that Paul Winans was the kind of a man who might pull this kind of a deal (R. 1698-9); and since the filing of the action perhaps as many as twenty—but he doubted that there were as many as fifty—had said that they thought he was the type of man "that would do this which was reported in the paper" (R. 1699-1700).

It must, of course, be borne in mind that it was only about eight years earlier that the Winans, with knowledge of the government's claim, but without disclosing that fact to the Title Company (R. 878) had obtained a title policy from another company which likewise did not discover this defect until too late, and made a compromise settlement for $3,000. Just prior to the issuance of the policy, there was a deed recorded to Ethel Winans from her parents (R. 1890, 1895), although there was no actual sale. So naturally when news of the present sale and of the same mistake having been made by another title company became known, one would expect considerable talk among the local residents, and that some of them, even before the complaint was filed, would have suspicions of the honesty of those who were twice beneficiaries of such an identical error.

The best evidence that such unfavorable gossip was prevalent even before that complaint was filed came from Paul Winans himself. On November 22, 1951, being five days *before* the original complaint was filed and at a time when Winans said he did not know that he was to be sued (R. 1726), he sent a telegram to Parker (Ex. 103; R. 880, 2208) reading as follows:

> "Can you contact me Congress Hotel, Portland, tomorrow 1:30 p.m. to 3:00 p.m. Re statement believe mutual interest best served through primary conference with you.
>
> Paul Winans"

Asked why he sent this wire, he said (R. 881):

> "There were a lot of factors, Mr. Jaureguy, building up before that that would take some time to explain. However, after this publicity came about through the breaking of this matter in the Hood River Sun, I and the family felt that we were being put at a disadvantage through this publicity through false statements, and we wanted to do something to correct it in the public mind. It was causing a lot of interested gossip and discomfort of mind to our people so I figured that I would do something about it, and before doing that, from what I had read in the paper, I thought it might involve perhaps also Mr. Parker with whom, so far as I knew, my relations were friendly, and I thought it was only fair to give him a chance to do something about it before I issued a statement."

Of course, the publicity given in one of the newspaper articles following the filing of the complaint (R. 1928-31) regarding the prior compromise settlement with the other title company, followed by a quotation from the complaint that prior to this sale the "Winans falsely represented to defendant Walter Stegmann that they

were the owners of a merchantable title" could not help but create a bad impression of Winans. There is no contention that any of this information came from the Parkers.

However, the damages allowed the Winans by the court actually were not for any loss of reputation, or diminution in credit standing, but for the expenses of defending this lawsuit.

Winans' Attorneys' Fees As Their Measure of Damages

That the court considered only the attorneys' fees incurred by the Winans in allowing damages, is clear both from the opinion and from the findings. The opinion states that "the Winans are entitled to a judgment against the Parkers and Stegmann for the damages they incurred as a result of the slander" and that they "have suffered damages at least equal to the amount of attorneys' fees which they incurred in defending this action" (R. 117). No reference is made in the opinion to any other alleged damages.

The findings state that the filing of the action and the publicity which it received "caused injury and damage to the third party defendants Winans in that it not only required them to expend their own time in the preparation and trial of this case but also required them to employ and pay for the services of attorneys to represent them in such action." The findings further state that the action and publicity "made it more difficult for third party defendants Paul Winans and Linnaeus

Winans to obtain credit in connection with their respective businesses" (R. 143).

The next finding is that "the third party defendants Winans suffered damages in the sum of $9,000.00" (R. 143) and the judgment in this amount is in favor of "the third party defendants" that is the five Winans (R. 149).

Since only two of the five members of the Winans family were found to have suffered damages other than attorneys' fees and other expenses of this lawsuit, they would be the only ones entitled to recover for those damages. This makes it abundantly clear that the judgment of $9,000 is for attorneys' fees, and perhaps other expenses, in connection with the defense against the Title Company's claim against the Winans for rescission and recovery of the purchase money, as well as for prosecuting their own claim against the Parkers and Stegmann and the Title Company.

The court in its opinion said that, pursuant to a stipulation, testimony would be taken respecting the amount of work performed by the attorneys for the Winans and that "Such amount or such portion of the work which I believe should be chargeable to the Parkers will be awarded the Winans not as attorneys' fees but as damages for the slander" (R. 118).

Such a hearing was held on March 20, 1953 (R. 1868-76), at which a memorandum was filed by Winans' attorneys of the work done by them, the total time involved being 853 hours (R. 1876). There was no attempt to segregate the services as between the defense

and the prosecution of the various claims. The memorandum listed services in "Legal research and preparation of legal memoranda," there being thirteen important subjects of research, none of which had any reference to the Winans' claim against the Parkers (R. 1875).

There was some discussion at the hearing respecting taxable costs and the Winans' attorneys pointed out that "Our action against the Parkers and Stegmann is a law action, and I assumed that costs would follow the judgment, and that action, of course, was against them" (R. 1870). The Title and Trust's case against the Winans was referred to as "an equity action" and "we would ordinarily be entitled to costs there." The judgment included costs to the Winans against both the Title Company and the Parkers (R. 149).

So we have here a case where parties to a lawsuit get their taxable costs and in addition thereto attorneys' fees for services in defending against the complaint and for prosecuting a crossclaim, in the same case.

There is no legal justification for any such judgment.

Both the Oregon statutory provisions and the Federal statute make it very clear that, except in very exceptional cases not involved here, or where a statute or contract authorizes it, a party to a lawsuit is not, as part of a judgment in that case, entitled to recover from the adverse party attorneys' fees for prosecuting or defending the case.

The Oregon statute on the subject reads as follows:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment or decree certain sums by way of indemnity for his attorney's fees in maintaining the action or suit, or defense thereto, which allowances are termed costs" ORS 20.010.

The amount of costs are set forth in ORS 20.070.

Under the above statute, it is well-settled that except when a statute or contract provides otherwise, the only indemnity for attorney's fees is these taxable costs. *Garrett v. Hunt,* 117 Or. 673, 245 P. 321, and cases therein cited.

In *Kellems v. California C.I.O. Council* (D.C. Cal.), 6 F.R.D. 358, Judge Goodman held that under a special California statute attorney's fees could be allowed the prevailing party in a libel action; and since the state law governed he gave judgment for attorney's fees. But he made it clear that, in the absence of such a special statute, attorney's fees, other than taxable costs, could not have been allowed, saying (at p. 360):

> "Attorneys' fees are not ordinarily allowable as costs in federal court actions at law (Maryland Casualty Co. v. United States, 4 Cir. 108 F. 2d 784), because of the settled practice, federal and state, to exclude them as such in the absence of a statute or rule specifically otherwise providing."

One of the cases cited in support of the above quotation was *Gold Dust Corporation v. Hoffenberg,* 87 F. 2d 451 (2d Cir.), from which we quote (p. 453):

> "Both in federal and state courts it is established in actions at law and almost uniformly settled in

> equity cases that counsel fees may not be recovered. Oelrichs v. Spain, supra. See Marks v. Leo Feist, Inc., supra. Exceptions are made if authorized by statute (see, for example, 1 N.J. Comp. Stat. 1910, p. 445, sec. 91; Diocese v. Toman [N.J. Ch.] 70 A. 881), as where costs are made recoverable in specific types of cases. This has been done as to actions brought to enforce orders of the Interstate Commerce Commission (49 U.S.C.A. sec. 16(2), or in suits for infringement of the Copyright Law (17 U.S.C.A. sec. 40), or in actions for violations of the anti-trust laws (15 U.S.C.A. sec. 15)."

The matter was also discussed in *Sprague v. Ticonic National Bank,* 307 U.S. 161, 167, and *Universal Oil Products Co. v. Root Refining Co.,* 328 U.S. 575, where the Supreme Court distinguished the general prevailing rule in the United States from the English practice. It held, however, in the first of the above two cases, that a party was entitled to attorney's fees in an equity suit in which a fund was recovered in a class action.

We have been able to discover no case like the present one in which attorney's fees, other than statutory costs, were allowed against opposing parties for services in the very case in which the services were performed because of alleged slanderous statements in the pleadings in that very case; and the authorities are uniformly opposed to any such allowance.

CONCLUSION

For any or all of the foregoing reasons, the judgment in favor of the Winans family against the Parkers should be reversed. The facts do not support the charge that in the conferences with the Title Company's attorneys the Parkers made any slanderous statements against the Winans. But if they had done so, the statements made during that conference were, as the Oregon decisions so clearly hold, subject to an absolute privilege. Furthermore, the inclusion of the Winans in the complaint was not the result of any statements made by the Parkers. Finally, the damages allowed—attorneys' fees in this case—would in no event be recoverable.

Respectfully submitted,

CAKE, JAUREGUY & HARDY,
Attorneys for Appellants,
Chet L. Parker and Lois M. Parker.

APPENDIX A

Testimony regarding alleged conversations between Paul Winans and Chet L. Parker on August 31, 1951, when Winans claimed he explained to Parker the Claim of the Government to the property. (See supra 17-8)

Testimony of Paul Winans (Tr. of R. 830-4):

"Q. Now, what was said between you and Mr. Parker during the whole course of the time you were together on that day, whether it was August 30th or 31st, when you were up on the survey party?

A. Well, Stegmann was driving his car, and my brother Ross rode in the front seat with him, and Mr. Parker and I and the son rode in the back seat, and there was continuous conversation over matters, as I remember it, wholly unrelated to this transaction or the survey on the way up to Lost Lake.

Q. Tell us just all of the conversation that occurred between you and Parker relative to the Lost Lake property on that day?

A. I think, *I can't say that there was any specific conversation until we got out onto the job,* and Mr. Parker was handling the compass, and I think my brother Ross driving the iron stakes, and Mr. Parker had this instrument which, I believe, is a staff compass, and was taking the bearings and directing the distances, or, rather, some of the others were handling the—it was not a log chain; it was perhaps a 100-foot tape. He was giving the bearings, and the others were taking distances

(Testimony of Paul Winans.)

to the bearing trees that he directed to be marked, and he was taking the notes of the bearings—

Q. What were the conversations between you and Mr. Parker about the property, if there were any?

A. *That did not come up for quite some time until after we were on the job,* and it was started by Mr. Stegmann. He brought it up in this way, sort of an off-hand remark or statement. He said, 'Well, you have title insurance on this property, don't you, Paul?' I said, 'We do, effective on Lot 1 only.' I told him that on the title insurance adjustment, as I had previously told him many times, it had been written off and that it was effective only on Lot 1, and I think I told him the amount of $2,000.

Q. All right. Now, just let me interrupt for a moment. While this conversation was going on were you and Parker and Stegmann all standing together?

A. Generally so throughout the day's work. There was some break-up.

Q. No, I am referring to this conversation you are just speaking about when Stegmann said that you have a title insurance policy on this.

A. Definitely so, we had to be together.

Q. That is what I am asking. A. Right.

Q. Now, whereabouts on the property were you?

A. Well, we were on this reserved area line because we did it while we were at work on it. Just the exact point I can't tell you now.

Q. Go ahead with what the conversation was about the property.

(Testimony of Paul Winans.)

A. Well, what it led into was just simply going over all that I had told Stegmann before generally around and including this discussion or explanation of the whole title picture which included the fact that we had had a title insurance adjustment, and I think I went further than that and set up the grounds, as I understood them, for the Government's claim to the property.

Q. You mean the fact that the government's survey had never been completed as to the 40-acre tract?

A. Well, further, I knew that I quoted the Supreme Court decision bearing on similar cases.

Q. All right. Did you advise—in the course of that conversation was the fact mentioned that you had written to Attorney Sever, Frank Sever, to attempt to get a private bill through Congress?

A. Definitely, I am sure of that.

Q. You told them at that time, did you, that you had paid all the taxes on the property? A. I did.

Q. For years and years?

The Court: Where was Mr. Parker standing with reference to where you and Mr. Stegmann were standing?

The Witness: It is a little difficult to say to that, but within very close earshot.

The Court: Did Mr. Parker participate in any of the conversation?

The Witness: Immediately following Stegmann's opening conversation Parker took over, and from there on the whole conversation practically was between myself and Mr. Parker.

(Testimony of Paul Winans.)

The Court: So you were telling Mr. Parker about a defect in the title and explaining what had been done, and Mr. Parker was answering you?

The Witness: I think he sort of led me on. He was very interested.

The Court: Go ahead.

Q. (By Mr. Strayer): Was the purchase of the property by Mr. Stegmann from you discussed between you and Mr. Parker in the course of that conversation?

A. I would say definitely yes.

Q. Was there some conversation about possible tax advantages that you might be able to make if you were to handle the purchase a little differently?

A. Yes, there had been. In the first place, Stegmann I think perhaps upon the second contract he had asked me if I wanted it all in cash and suggested that sometimes people would like to have it split between the two years so that not to have such a heavy tax load, and this was resumed a little later. It was following the title discussion.

Q. Did Mr. Parker discuss this tax question with you?

A. He certainly did. He led it.

Q. Did he make any recommendation to you?

A. He did." (Italics added)

Testimony of Ross Winans (Tr. of R. 1618-9):

"Q. I asked you when did you get acquainted with Parker, if you did meet him?

A. Well, that was later on towards, around, after the 30th or 31st of August when he came back to our place. I met them at the station.

(Testimony of Ross Winans.)

Q. Who did you meet at the station?

A. I met, I was acquainted with Walter Stegmann, but not yet with Mr. Parker nor his son. We rode together.

Q. Parker and his son showed up that day?

A. That is the first I had seen them.

Q. Did you go up to the lake with Stegmann and Parker and his son and Paul?

A. Yes, that is right.

Q. On that same day? A. Yes.

Q. Did you have any conversation with Mr. Parker on that day while you were up there on the ground?

A. Yes.

Q. Did you hear anything said regarding the title to the forty acres?

A. Yes, there was considerable said about it.

Q. What was said and by whom and to whom?

A. Well, much the same as what we had already gone over with Mr. Stegmann, that it was to be corrected, the title, through the Act, through our congressman and an Act of Congress.

Q. Did that involve the 25 acres too, that were bordering on the lake, or just the forty acres?

A. The back forty.

Q. Just the back forty."

(Tr. of R. 1626-7)

"Q. *You are sure the conversation took place on the road up to Lost Lake?* A. *It did.*

Q. Tell us what was said about the defect in the title on this trip, or, if anything about a defect was said.

(Testimony of Ross Winans.)

A. Well, they were to—Mr. Stegmann, especially, was the only one that I knew—was to know that we were not giving a warranty title to the back forty.

Q. Now, who said this, Mr. Stegmann, Paul Winans?

A. Paul Winans.

Q. Can you repeat his words?

A. He says, 'We are working on it through Senator Cordon to get the title cleared up through an Act of Congress.' Mr. Stegmann brought up Mr. Morse, then, and said that they were friends, he and his father were friends of Senator Morse and they could use Senator Morse.

Q. How did this subject come up?

A. Pardon?

Q. How did the subject come up in the conversation?

A. Well, along with the general talk about Lost Lake and about the property and how we had acquired it. I was with my father when he bought it.

Q. *Was that all you were talking about all the way* up?

A. Not necessarily. It was other—touched on other things, politics.

Q. Give us your conversation while on the way up?

A. Politics and jokes."

(Tr. of R. 1628-9)

"The Court: All right, Mr. Winans, try to give him a play-by-play description of what happened after you got in the car.

The Witness: Yes. Well, after Paul mentioned that we were endeavoring to get the title cleared on the

(Testimony of Ross Winans.)

back forty and, as said a moment ago, he referred then to Senator Morse, and maybe we talked about that for a little while, talked about politics, talked about the weather, possibly, and conditions of the road, and met a log truck and changed the conversation, and then back again to the property."

(Tr. of R. 1630-1)

"A. It is this, that Paul says, 'We will get Senator Cordon and ask him if he is already working on it to get an Act of Congress to clear up that back forty.' And Mr. Stegmann says, 'We will work through our friend, Senator Morse.'

Q. Did your brother Paul tell him *in your presence on the trip* that the Government claimed ownership of that Lot 2 of the forty-acre tract?

A. As near as I can remember, yes.

Q. What was the nature of the defect in that title to Lot 2, not what the real nature of it—what did your brother Paul tell him was the difficulty with that title?

A. Other than the Government claimed that as it was not surveyed, the State gave title to it to Macrum and through Macrum to my father.

Q. Was there any discussion relative to a claim having been made to Pacific Abstract & Title Company some years previous? Was that discussed?

A. That I couldn't say.

The Court: Well, I did the best I could, but is there anything else you would like to ask him with reference to that?

(Testimony of Ross Winans.)

Cross-Examination

(Continued)

By Mr. Ryan:

"Q. Was it your understanding that you people had a good title to that; that you had a right to that property? A. We had a warranty deed.

Q. *You felt at the time that you had a right to that property?* A. *Yes.*" (Italics added)

(Tr. of R. 1639-42)

"Q. You say that when you were going up there to the lake on August 11th with your brother and Walt Stegmann that nobody mentioned the fact that you theretofore had collected from the Pacific Abstract & Title Company on a title policy? A. No.

Q. At any other time— A. No, sir.

Q. At any other time did you ever hear your brother Paul tell any of the parties that we have been talking about the title policy that you had with Pacific Abstract? A. Never.

Q. You never heard him say that he had a title policy?

A. Yes, I understood that at one time.

Q. No, I don't mean—I will have to correct myself—I made a mistake. I didn't mean to say that you ever heard it. I mean did you ever hear him say anything about a title policy to Walt Stegmann? A. No.

Q. Or to Chet Parker? A. No.

Q. Or tell them that he had collected money on a title policy? A. No, sir.

Q. You knew that the money had been collected on

(Testimony of Ross Winans.)

the policy? A. Yes.

Q. You are saying that with some hesitancy as though you are not sure.

A. Not necessarily, no.

Q. No, that is, you mean—

A. Nothing that I should not hesitate on.

Q. Now, I say you are sure; you knew about it?

A. Yes.

Q. Very well. You were with the boy quite a lot that day on the 31st day of August; were you not?

A. Well, pretty much. On the trip up there and back we got quite friendly.

Q. And you had a deal on a bear skin?

A. Now, that is very common.

Q. Now, whereabouts was it on that day where you say your brother was telling Chet Parker about trying to get this Act through Congress? Where was that, in the car up there? A. Yes.

Q. *In the car on the way up?* A. *Yes, sir.*

Q. *So they didn't discuss that after they got up there, as far as you know?*

A. *Not to my knowledge, and I was with them practically all the while out there.* When they went to lunch, that I wouldn't know, was to themselves.

Q. When your brother was telling Chet Parker on the way up there about getting this Act through Congress, was he a Cordon supporter or a Morse supporter? Did he feel that Cordon was the man to do it or Morse was the man to do it?

A. Not necessarily. He had some work through the

(Testimony of Ross Winans.)

attorneys, Cordon, I believe, and his attorneys were connected, that is all. Brother Paul evidently kind of liked that Cordon.

The Court: Mr. Jaureguy, I thought that this was a conversation with Mr. Stegmann and not with Mr. Parker.

Mr. Jaureguy: We have left that and come to another one. We were talking about the Stegmann conversation a little while ago. Now he is on the way up in the car; is that correct; am I guoting you right that on the 31st of August on the way up to Lost Lake in the car your brother told Chet Parker about trying to get this Act through Congress?

A. Well, it came up, well, he didn't necessarily tell him, but it was talked along with other discussions.

Q. Who was in the car besides you and your brother and Chet Parker?

A. Well, Stegmann was driving. I was in the front seat with Walter. Chet and his son was in the rear seat with Paul.

Q. Were the five of you in the car going up?

A. That is correct." (Italics added.)

Testimony of Chet L. Parker:

(Tr. of R. 292)

"Q. All right. Let's get on down, then, to the 30th, which, I believe, was the day that you went into the title office and ordered a purchaser's policy, was it not, or was it ordered before that?

A. No, I think it is—my diary says it is on the 30th, and I am referring to my diary. I certainly could not re-

(Testimony of Chet L. Parker.)

call that date out of memory."

(Tr. of R. 293)

"Q. All right. Then, on the following day your diary indicates that you and Walter Stegmann and your son, Myron, Paul Winans, Ross Winans all went to Lost Lake to set out that 8.8 acres. Now, I wish you would tell us about that trip, Mr. Parker.

A. Well, we drove all in the same car. I believe it was my car, but I am not sure—from Winans' office to Lost Lake, and we cut some brush and pulled a tape around in the brush, measured a little land. Mr. Stegmann took a lot of notes, and that's about all. We went back home."

(Tr. of R. 293-5)

"Q. Then on the 31st you were up there, and you were helping in the survey of this reserved area, were you, or was that the survey of the tracts themselves.?

A. No. I was helping Walt survey the—I really don't know what we was surveying. We was running around there cutting brush, pulling a tape through the brush. I guess we were surveying the excluded area or attempting part of it or something.

Q. Now, did you have any discussion with Mr. Winans on that day about anything.

A. Yes, about the amount of acres.

Q. Anything else?

A. Well, he wanted all the lake frontage.

Q. You had an argument about that particular area that would be reserved to him; is that right.

A. Sure; he was getting everything but a hundred

(Testimony of Chet L. Parker.)

feet of lake frontage, and I thought to myself I would like to have a little more than a hundred feet left of lake frontage. I remember having a violent argument. No one engaged in fisticuffs exactly, but I won't deny that I wanted to.

Q. That is the only thing that you can recall discussing with Mr. Winans on that day?

A. Well, we made a discussion, and finally he said I could have—he would be very generous with me, would give me three or four hundred feet of frontage, and he would take fourteen or fifteen hundred feet and any other additional property would be had into the acre. I believe we sat down and figured out that at that time.

Q. Well, I note that your diary says you got back to Hood River too late that evening to get your title policy, and on the following day, on September 1st you and your wife went to McMinnville to see some timber on Pea Vine so I take it that is where the Labor Day week end came in which resulted in your not getting the policy until the following week; am I right on that Mr. Parker?

A. Well, I suppose yes."

(Tr. of R. 480-1)

"Q. Tell us where and under what circumstances you met any of the Winans on the 31st of August?

A. Well, Walt was going to go up and survey the lines, and we were supposed to help.

Q. Who is 'We'?

A. Oh, Paul and I and Ross and my son. As I

(Testimony of Chet L. Parker.)

remember, we went up to the lake, and I believe in my car, but I am not sure whose car it was. It possibly was mine, because most people want to wear out mine instead of theirs, and we worked that day.

Q. What did you do?

A. Well, we was surveying, cutting brush.

Q. What were you surveying?

A. Well, I really don't know. We were supposed to be surveying some land, I guess.

Q. I assume that, but were you trying to survey the 40-acre tract, or were you surveying some part of the entire tract?

A. We was working next to the lake. As I remember, Mr. Stegmann started at the edge of the lake, and we kept running funny lines around trying—as far as I was concerned, I wanted all the timber. I didn't care about anything else, but I wanted the trees."

(Tr. of R. 482)

"Was there anything said by Mr. Ross Winans or Paul Winans regarding title to any part of that property that you were working on?

A. To me?

Q. Well, to you or in your presence?

A. Not that I heard, no."

(Tr. of R. 487-8)

"Q. The dates I am concerned with, Mr. Parker, are from the 17th of August on because that is the first time you said you talked to Paul Winans or any of the Winans. From the 17th of August on to the time that you got your deed and paid your money was there—did

(Testimony of Chet L. Parker.)

you have any telephone conversation with Paul Winans or any of the Winans relating to the ownership, the title of the Lost Lake property?

A. No, I don't remember of having anything to do with specifically the title of the property, any more discussion, other than that night of the 18th, if that was the night I was there, which I presume it was."

(Tr. of R. 491)

"Q. (By Mr. Krause): At any rate, you and these other four people—that is, your son and the two Winans and Stegmann—were up there surveying on one occasion, were you not?

A. Yes, I think that is all that was present.

Q. That is all that were present?

A. I think that is all that were present.

Q. Mr. Parker, isn't it a fact that upon that occasion Paul Winans told you of the claim of the United States against the 40-acre tract.

A. I think I have answered that already. He did not."

(Tr. of R. 492)

"Q. (By Mr. Krause): At any rate, you are sure of that, Mr. Parker, that while you men were up there engaged in this surveying operation Mr. Paul Winans did not tell you that the United States claimed ownership of the 40-acre tract?

A. No, I remember—if he did, I certainly would have remembered it."

(Tr. of R. 493)

"Q. Mr. Parker, did Mr. Paul Winans on that same occasion when you five men were up there on the prop-

(Testimony of Chet L. Parker.)

erty engaged in surveying the reserved area tell you that a title policy which he had had on the 40-acre tract as well as the 25-acre tract, that he had been paid $3,000 in settlement because of the Government's claim against the 40-acre tract.

A. No, I never heard anything about any $3,000 settlement.

Q. Did you hear anything about any kind of a settlement of that policy?

A. No, I never heard anything about a settlement of any policy."

Testimony of Walter Stegmann
(Tr. of R. 735-6)

"Q. Was there any discussion while you were up on the Lost Lake property on that day as to the, as to what steps would be necessary to get a title to the 40 acres?

A. I know of no discussion.

Q. Were there any discussions regarding income taxes?

A. There seemed to be quite some discussion between Mr. Parker and Winans. They would—at different times when I would be surveying and laying out the piece of property, why then, it was not right, and then I would go back and do it over again, and it seemed like the amount of acreage—they were sitting down there on the bridge or having quite a—I don't know, it seemed like it would have been a heated argument there about—their figures didn't agree on the acreage.

Q. By 'their figures' you mean Parker's?

A. Parker's and Winans'.

(Testimony of Walter Stegmann.)

Q. Parker's and Winans' figures?

A. And I didn't have too—hear their conversation because I would pass by them sometimes, and sometimes I would be quite near for a few minutes, and then I would be quite some distance from them.

Q. Well, there were discussions regarding the reserved area, but my present one, did you hear anything regarding income taxes?

A. There might have—yes, I believe there was some. I am sure that at noon when we were eating lunch by the park there may have been some discussion about income tax.

Q. Was there anything said about a claim having been made by Ethel Winans against the Pacifiic Abstract Title Company because of the condition of the title on the 40 acres?

A. None that I know of.

Q. You didn't hear about it? A. No."

(Tr. of R. 1544-6)

"Q. Now, on August 31st, on the day where there has been some testimony here that you and Mr. Winans and Ross Winans and Chet Parker and Myron Parker were on the Lost Lake area premises, do you recall that day?

A. You mean when Chet Parker and Myron Parker and Paul Winans and Ross Winans and myself were up there?

Q. Yes.

A. You say that was the 31st of August?

Q. Yes, according to the testimony.

(Testimony of Walter Stegmann.)

A. I don't know the exact date, but I am sure, though, that that was the exact day when the reserved area was finished, and that we went up there to agree on the reserved property and set stakes out and mark the trees and to conclude this reserved area.

Q. Do you recall overhearing any conversations or being present at any conversations between Paul Winans and Chet Parker on that day?

A. Well, I don't—I wasn't present, I don't believe, at any conversation, only that surveying these lines, why, maybe I would be, pass by him, or walking along the trails, you know, this line, why, I might pass by him, or everybody seemed to be doing a little bit of helping in the surveying, and that I remember the one time when I was close by they were having a discussion, a heated discussion there in the trail. They were—I don't know whether they were arriving at the volume or acreage or what they were discussing, but they seemed to be having quite a discussion there.

Q. With respect to the reserved area, were you being consulted by Mr. Winans as to the parts to be reserved in that survey?

A. How did you mean that exactly?

Q. Mr. Winans, when you would be running a line attempting to determine just what area would be reserved, was Mr. Winans dealing with you?

A. Dealing with me?

Q. Yes, was he talking with you about it?

A. No, he wasn't dealing with me, but sometimes he may have mentioned when I was running the lines,

(Testimony of Walter Stegmann.)

which it was my job to do, run the lines, and he was wondering if we went up a little farther with the line what it would look like, and we had quite a time deciding. I couldn't tell where they wanted to go. I would survey up one line, and then it seemed like him and Mr. Parker would change their mind, and then I would come back and we would start over on another angle.

Q. You said he and Mr. Parker would change their minds?

A. Well, it seemed like it.

Q. Were Mr. Parker and Mr. Winans consulting together to reach a decision regarding the reserved area?

A. They had been doing quite a bit of talking. What they were talking about I wasn't able to hear.

Q. Why would you say they changed their minds?

A. Well, I guess they changed their minds because I surveyed a little ways, would measure up, and we would set some stakes, and then we would come back and change it, so evidently it was not right, because I had to do it over again.

Q. At the conclusion of this day, had the reserved area been staked out?

A. At the end of this day, yes, they finally agreed on a reserved area there where—it was staked out.

Q. Was there any discussion in your presence to yourself or by anyone else, by Mr. Paul Winans regarding the state of the title to this property?

A. Well, I didn't hear any discussion on it at all. I mean regarding the state of the title."

APPENDIX B

Testimony of various witnesses on whether Chet Parker was with Paul Winans, the evening of August 18, 1951. (See supra, 46-8)

Testimony of Chet L. Parker.
(Tr. of R. 264-6)

"Q. Did you have any arrangement about notifying Mr. Winans of this intended meeting on the 18th?

A. Well, it seems to me that Mr. Stegmann was going to do some surveying in a day or two—or the day of the 18th, and that he would tell Mr. Winans, as I remember it.

Q. Stegmann was to tell Mr. Winans that you would meet on the 18th, the evening of the 18th?

A. Well, now, I am not positive about it, but I think that is the way it was.

Q. Well, do you recall something of that kind?

A. Well, it certainly is not very fresh in my memory.

Q. Well, did you go there and meet with Mr. Stegmann and Mr. Winans?

A. Well, I didn't go—I went purposely to meet and see that that deal, the election to purchase, was already completed.

Q. You did see Mr. Winans that night?

A. Yes.

Q. Mr. Paul Winans? A. Yes.

Q. At his office in Hood River?

A. No, not at Hood River.

Q. Oh, Dee, is it?

(Testimony of Chet L. Parker.)

A. Well he has got an office there.

Q. What is that?

A. He has got an office, and he is not either at Dee or Hood River.

Q. Just where is it?

A. Well, it is in between both places.

Q. At any rate, that is where you met?

A. Yes.

Q. Was that the first time that you had ever met Mr. Winans?

A. To my recollection, yes.

Q. Were you introduced to him at that time?

A. Yes.

Q. Who introduced you?

A. I believe, well, either myself—I believe I introduced myself.

Q. Who was present there when you came in?

A. In the office itself?

Q. Yes.

A. Well, it seemed that Walt was there, Walt Stegmann, and another person and Paul Winans.

Q. Who was the other person?

A. I don't know.

Q. Were you introduced to him?

A. I don't believe so.

Q. It was a man, I take it?

A. Yes, I think a man, maybe a woman.

Q. Were you by yourself that day?

A. I think I was, yes, but I am not sure.

Q. Is there anything in your diary to indicate that

(Testimony of Chet L. Parker.)

anyone was with you? A. No.

Q. That, then, is your first meeting, to your knowledge, with Mr. Paul Winans? A. Yes.

Q. Had you ever talked with him before?

A. In person?

Q. Either in person or by telephone.

A. I don't think I did, but I might have.

Q. Well, do you have any recollection of a telephone call before that time?

A. Well, I have a recollection of a telephone call, and I do not know that it was a day or two before the 18th or a day or two afterwards, or what time it was."

(Tr. of R. 275-80)

"Q. Well, now, going back to your meeting on August 18th, the evening of August 18th, at Paul Winans' home, will you just take us right through that meeting and tell us everything that happened then?

* * * * *

The Witness: I was there not very long, for a long length of time. It would be purely a guess, but it would seem like maybe an hour or less. I really don't remember vividly anything other than what kind of a deal I was going to get for this property. I was interested in it because from the instruments I had or the papers I had from Mr. Stegmann it did not indicate that I would get either a title insurance policy or an abstract, and I was very interested in which one I would get because I certainly would have to have one or the other, and I preferred, of course, a title policy. Mr. Winans told me and pointed out to me that his instruments did not call

(Testimony of Chet L. Parker.)

for him paying for a title policy, and if I wanted one I would have to pay for it myself, and that is about the extent—oh, there was something about surveying, Mr. Stegmann would be doing the surveying, and from there on he would be dealing with me.

Q. What?

A. That Mr. Stegmann would be doing the surveying of the property from then on, and he would be dealing with me from then on to finish paying for it, and that is about—oh there was some—then I left alone, if I was alone, and I am sure I was. At least, I left his office alone. No one else went in with me to his office.

Q. Your recollection is that you were there about an hour?

A. Well, it wasn't over that long if shorter.

Q. When you arrived Mr. Stegmann was already there?

A. Yes, I am sure he was.

Q. When you left was Mr. Stegmann there?

A. That I am not sure about.

Q. What is your best recollection as to whether you left first or Stegmann left first?

A. I would not, absolutely would not know which one left first.

Q. You haven't anything that you can refer to to refresh your memory on that?

A. No, that—

The Court: I did not fully understand that testimony with reference to the title insurance or abstract. Would you mind reading that testimony?

(Testimony of Chet L. Parker.)

(Testimony referred to was read by the Reporter.)

Q. (By Mr. Strayer): Mr. Parker, on the subject of who left first I have here a copy of your deposition which was taken on August 7, 1952. Do you recall the occasion of your deposition?

The Court: Do we have copies of those depositions?

Mr. Strayer: Yes.

The Court: Under the practice here the witness is entitled to see the deposition.

Mr. Buell: That is Exhibit 22.

Q. (By Mr. Strayer): Were you not asked this question, Mr. Parker, and did you not give this answer on your deposition:

'Q. Stegmann left ahead of you that evening?

'A. I think he left ahead, but I am not sure.'

* * * * *

Mr. Strayer: I am trying to refresh his memory, your Honor. I am not trying to impeach him.

The Witness: Well, it is not as fresh now as it was when this deposition was taken. This has been some time ago, too. It is more hazy than ever in going over the recurrence of the event. Normally, when I purchase a piece of timber I don't make a note that I left before Bill Jones or John Doe, or my own memory or otherwise, and I don't remember whether he left first or afterwards, but I believe I left first. I am still thinking maybe I might have left first.

Q. (By Mr. Strayer): You think now that you may have left first. I beg your pardon. You thought when this deposition was taken that you left first?

(Testimony of Chet L. Parker.)

A. Yes—

Q. No, no; the other way around; you thought when the deposition was taken that he left before you did, and you are now—your best recollection is that you left first?

A. Well, we didn't leave together.

Q. I know, but that is not the question.

A. Well, I am sorry; I can't say whether we left first, last, or when he left.

Q. All right. Now, what conversation took place regarding this notice of election to purchase, Mr. Parker?

* * * * *

Q. (By Mr. Strayer): You have before you Exhibit 26, which I understand from your counsel is a copy of Notice of Election to Purchase which you delivered to him at his request; is that right, Mr. Parker? You delivered it to Mr. Jaureguy at his request?

A. Yes, I think so.

Q. Yes, and what is that document?

A. Well, it says election, Notice of Election to Purchase.

Q. Is that the copy that you took away from the meeting on August 18th? A. Yes.

Q. All right. Now, tell us about the conversation regarding the signing of that notice?

A. Well, I was not there when it was signed.

Q. It had already been signed when you arrived, you mean?

A. I am pretty sure it was signed when I arrived. I am not real sure about it, but I think it was.

(Testimony of Chet L. Parker.)

Q. You think it had already been signed when you arrived?

A. I think it was."

(Tr. of R. 284-5)

"Q. When you were first talking with Mr. Winans did you tell him that you had brought out Mr. Stegmann?

A. I told him from now on he was dealing with me.

Q. How did that conversation arise?

A. I was there doing business. I wanted to know about the deal, whether Stegmann paid the $4,000 or not.

Q. What did you say to Mr. Winans when you walked in? You shook hands with him, I assume, told him you were Chet Parker?

A. I don't know axactly the exact words I said or the exact moment I said them. It is not vivid in my memory.

Q. Well, did you say, in effect, that you were there to close up the deal for the purchase of the property?

A. Not to close the deal but that Mr. Stegmann would be out of the deal from now on. It would be Chet Parker he would be dealing with. Mr. Stegmann would be surveying and anything to do with the set-out area, why, he would have to do it.

Q. Did Mr. Winans appear to be surprised that you had an interest in it?

A. Well, I don't know whether he was surprised or not.

Q. Had the $4,000 been paid at the time you arrived?

A. You mean the check given?

(Testimony of Chet L. Parker.)

Q. Yes.

A. I believe it was, but I am not sure.

Q. Do you recall any discussion about the payment at this meeting?

A. No; no, I don't."

(Tr. of R. 344-6)

"Q. (By Mr. Strayer): All right. Now, if you will refer to page 21 and to 41 of the deposition with reference to your—I believe this refers to your talk with Mr. Winans on the 18th of August and particularly your testimony with reference to discussions with Paul Winans on title insurance:

'Q. But the first time this discussion of title insurance came up between you and Paul Winans was that particular evening? A. Yes.

'Q. That is when you asked him to furnish title insurance?

'A. I asked him, yes, what he was going to do for the title. He told me—

'Q. And it was after that when he refused to do anything, you decided you had better do it yourself?

'A. That is right. I told him I didn't want an abstract on it; I would have to go buy some title insurance, then. He told me it was the Hood River office, the title insurance.

'Q. So when after that you decided to get some title insurance and to go and do it on your own?

'A. I decided to get a title report first, to see that he owned it or someone owned it that was trying to work the deal. Then I decided, after talk-

(Testimony of Chet L. Parker.)

ing to the attorney, that I could purchase title insurance. Up to then I didn't even know I could purchase title insurance.'

Q. Do you remember having given that testimony, Mr. Parker? A. Yes.

Q. Am I correct in my interpretation? Apparently, when you gave your deposition, you were then under the impression that you had not yet ordered a title report at the time that you talked with Paul Winans?

A. Well, I knew I had ordered a title report. I was a little confused no doubt, between the purchaser's policy and the title report.

Q. You did on that occasion ask Mr. Winans to furnish you with title insurance, did you?

A. Yes, and he indicated—well, he said he would give me an abstract. I told him I would rather have title insurance, and he indicated to me that if I wanted title insurance I would pay for it, he wouldn't; that any of his instruments, they call for payment of any title insurance.

Q. You were willing to pay for the title insurance?

A. Well—

Q. Well, you told Winans you were?

A. Well, I was forced to then from then on.

Q. What is that?

A. If I was going to get any, he told me I would have to pay for it.

Q. Did you tell him you would pay for it?

A. Yes I believe I told him I would pay for the additional amount. He had an $8,000 policy to turn in

(Testimony of Chet L. Parker.)

on it. I would pay for the additional amount.

Q. You told him you would pay additional, which meant that Mr. Winans would not be out anything for title insurance; is that it? A. That's right.

Q. Well, then, you really had no problem of getting title insurance, a title insurance policy, as long as you were willing to pay for it, did you?

A. Yes, I had a problem. I didn't even know I could get a purchaser's policy until I had it in my name.

Q. Why were you interested in a purchaser's policy?

A. Because when I buy property I like to have a good deed for it so it can be recorded, and then I can order an abstract or I have a policy of title insurance."

(Tr. of R. 348)

"Q. You do not remember Mr. Winans making any representation, as to what kind of title he had, do you?

A. Well, he had title insurance on it. I don't know what; I don't know what—when you say title insurance, I don't know what you mean by title.

Q. I mean did he claim to be the owner of the property?

A. That assignment indicated to me he was the owner of the property.

Q. That was not the question, though. Did Mr. Winans make any statement to you as to who owned the property?

A. Well I think he did, but I am not real sure.

Q. What is your best recollection as to what he did say about it?

A. Well, there was a discussion concerning the title

(Testimony of Chet L. Parker.)
policy, who was going to pay for it and that he had—that there was a title policy now in existence on it of the total amount of $8,000, as I remember."

Testimony of Walter Stegmann
(Tr. of R. 718-19)

"Q. Was there any such discussion at any time in your presence?

A. There might have been, yes. I believe there was. It seems like it was on August 18th that—in the evening of August 18th. Let's see, I think it was about dusk Mr. Parker come up there, and they were having some discussion on who was going to do what, but I didn't, had nothing to do with it.

Q. They were having a discussion about who was going to do what?

A. They were having a discussion on the, who was going to furnish—it seems like he was going to furnish an abstract because he already had a title policy or something like that.

Q. By 'he' you mean Winans?

A. Winans, he said that they would probably furnish an abstract, but they already had a title policy, and he, I think, attempted, Mr. Winans did, to look for that title policy that same evening.

Q. You had him looking for the title policy earlier than that, too, didn't you, in your talks?

A. I didn't have him looking for it, but he did it on his own by looking for it to get the description of the property.

Q. Is this the second occasion that he was looking

(Testimony of Walter Stegmann.)

for the title policy? A. Yes.

Q. The first time he was looking for it to get the description off of it? A. Yes.

Q. And now he was looking for it in order to show it to Mr. Parker?

A. I believe that is what he was doing."

(Tr. of R. 1535-6)

"Q. Now, on this previous testimony as brought out here that you people were up there right until evening on the 18th of August—

A. It must have been probably close to four or five, I don't know, something like that, around five o'clock.

Q. Then you returned down to the gas station near Dee, Oregon?

A. Yes, we went back to his little office there at Dee, or it is across from his place there.

Q. Did the surveyors come down with you, or did they come down in a separate vehicle?

A. They drove up in a separate car, and they drove their own car back that evening.

Q. Did Carl Stegmann come down with you?

A. Yes, he come down. We, I am sure it was him, Carl Stegmann, Paul Winans, and myself that drove down in his car, and the surveyors, they come down in their other car ahead of us or just following us.

Q. You say you are sure it was him, Carl Stegmann, yourself and some other party?

A. I meant him, I meant Carl Stegmann. I said 'him' first. I meant Carl Stegmann, Paul Winans and myself were in this car that we drove back from Lost Lake to

(Testimony of Walter Stegmann.)

Paul Winans' place.

Q. Would you tell us what took place at Paul Winans' gas station there in Dee?

A. Well, yes, there was—the two surveyors, they wanted to hurry and leave and get back to Portland and they were doing some figuring there. They were figuring outside, I think on their car, and kind of comparing. Well, they had a few notes they were figuring and comparing, a few notes. They were figuring up the time or the hours they worked there, and Mr. Paul Winans was preparing to pay them off so that they could get started towards Portland, and I think he said that he had finished typing up a piece of paper before him and I could get on with our business and that he paid the surveyors off and they left."

(Tr. of R. 1537)

"Q. Did Mr. Chet L. Parker show up that evening?

A. Yes, he showed up there just about the time, I believe that—it was a little while after, I believe, the surveyors had left and Paul Winans was typing up that election to purchase and the extension of time for setting up this reserved area, and Mr. Parker come up there."

(Tr. of R. 1538-40)

"Q. At the time this was being typed out, had Mr. Parker come there, before the typing of the document, the Election to Purchase, had been typed out; do you remember?

A. Well, I don't remember exactly, but he might have come just about the time it was finished. I don't know, or I think he come after it was finished, typed out.

* * * * *

(Testimony of Walter Stegmann.)

Q. Can you recall any conversation regarding Mr. Parker's interest in the option when this question of the Election to Purchase was offered to you?

A. Well, I remember telling—what was that question again?

Q. Do you have any memory of any conversation regarding Mr. Parker's interest in the option at this time you have spoken about earlier in the—

A. I had spoken about it earlier, and I am sure I mentioned it at the time he was typing this up, and I didn't really think it was necessary for me to sign it. I thought it might have been part of the option, but I agreed on the extension of time, and I think it might have been that time that Mr. Parker come in and it was explained—Mr. Parker was introduced, or he introduced himself, and he could see no reason for signing it, and that him and Mr. Winans were dealing from then on. That was the understanding.

Q. Who said that?

A. Mr. Parker and Mr. Winans were dealing from then on.

Q. No, but I mean, were those words used?

A. What?

Q. Mr. Parker and Mr. Winans were dealing from then on, did Mr. Parker say that to Mr. Winans, or did you say that, or how—

A. Well, I told Mr. Winans that I had sold my option to Mr. Parker; that him and Mr. Parker were then dealing. Then I think probably when Mr. Parker come in there and was introduced or introduced himself that

(Testimony of Walter Stegmann.)

I said, 'This Mr. Parker is the one that bought the option, and you and him are dealing from now on.' I mean, I am not sure that that is the words, but I think—"

Testimony of Carl Stegmann

(Tr. of R. 1250-2)

"Q. Are you acquainted with Chet Parker?

A. Yes.

Q. How long have you known Chet Parker?

A. Oh, a couple of years, I suppose.

Q. Have you ever met Mr. Paul Winans?

A. I seen him one time, yes.

Q. At one time? A. Yes.

Q. When was that?

A. Well, that was in August last year, it was.

Q. August, 1952?

A. I believe it was, or '51. I am not sure.

Q. '51? A. '51.

Q. Do you remember the day in August that it was?

A. Well, not exactly. It was about the middle of August.

Q. Would you say it might have been August 18th? There has been testimony here that it was.

A. It probably could have been, yes.

Q. Where was it that you saw him?

A. Well, it was at his place the first time I seen him.

Q. Who else was there?

A. Well, I was with my brother.

Q. Did you go any place that day with Mr. Winans?

A. Well, we went up to, first up there at Lost Lake.

(Testimony of Carl Stegmann.)

Q. Did anybody go with you?

A. Well, I was with my brother and Mr. Winans.

Q. Was there anybody else went up?

A. No, not we—

Q. Well, I want to ask whether there weren't two men from Portland, surveyors, went up?

A. Well, they was in a different car.

Q. They were in a different car? A. Yes.

Q. But you and Mr. Winans and your brother, then, went up in his car, and then somebody went up in another car? A. That is right.

Q. How many were there in the other car?

A. Two.

Q. Were they surveyors?

A. They seemed to be. That is what they was up there for.

Q. Did they do surveying work up there at Lost Lake?

A. Well, yes, they were running lines around a piece of property up there.

Q. Then when you got through, did the five of you go back to the Winans place?

A. Yes, that is right.

Q. At any time did you see Chet Parker.

A. Yes, he was up there.

Q. Just tell us when and where you saw him?

A. Well, these surveyors was—there was kind of an office up there, and these surveyors had their car parked outside, and I was out there talking with them, and Mr. Parker pulled up on the other side of the road and got

(Testimony of Carl Stegmann.)

out of his car, walked across the road, and talked to me because I had seen him before, knowed him slightly before that. I knew who he was, and he went on in to the office, and shortly afterwards, well, him and my brother and Mr. Winans were inside, and then they came back out, and I don't know what they were talking about, but that is about all.

Q. When Chet Parker went in the office, were the two surveyors still there, or had they gone, if you remember?

A. They left about that time.

Q. They left about that time?

A. It has been quite a while ago. I just don't quite remember. They left about that time.

Q. You say you do not know what Chet Parker, Mr. Winans and your brother were talking about when they were inside?

A. No, I do not. I never paid any attention to their business. I didn't have any interest in it, and I never paid any attention to what they were talking about."

(Tr. of R. 1259-60)

"Q. While you were there at Mr. Winans' place, you were either wandering around, you say, or standing there talking to the surveyors?

A. That is right.

Q. Were the surveyors still there when you left the place?

A. No. I believe they had left before we did.

Q. You believe they had gone?

A. I believe they had gone.

(Testimony of Carl Stegmann.)

Q. When did you leave?

A. Well, shortly after Mr. Parker got there.

Q. You did not leave by yourself? A. No.

Q. Shortly after Mr. Parker got there you and your brother left? A. That is right.

* * * * *

Q. When you left up there at the Winans place, Chet Parker was still there was he?

A. Well, now, I don't really remember whether he was still there or not. It seems to me like somebody drove up on the road. Now, there were several cars parked there and I don't know whether he left right then or whether he was still there. I believe he was still there. I rightly wouldn't swear to that.

Q. This one day is the only day that you were ever up there in that Hood River area; is that right?

A. That is right."

(Tr. of R. 1264-5)

"Q. Were you with them when Mr. Parker drove up?

A. Yes, I was standing right by the car.

Q. Were you talking to them at the time?

A. I was talking to the surveyors at the time.

Q. How close to the car did Mr. Parker come?

A. Oh, I would say 20, 30 feet.

Q. He walked on into the service station?

A. That is right.

Q. Did you watch to see what they seemed to be doing in the service station?

A. No, I did not.

Q. I take it your brother Walter was in there at the

(Testimony of Carl Stegmann.)

time? A. Yes, he was.

Q. Then later he came out before Mr. Parker, didn't he?

A. Well, let's see, I believe they all come out about the same time. That I don't really know.

Q. Which one of you drove away first? Was Mr. Parker's car still there when you and brother left?

A. Yes, it was, I believe.

Q. Were the surveyors still there when you left?

A. No, they had left before we did.

Q. Oh, the surveyors left before you and Walter Stegmann?

A. That is right. I believe they did."

Testimony of Paul Winans

(Tr. of R. 819-20)

"Q. Had you received any telephone calls prior to August 18th from any man or identifying himself over the phone as a Mr. Chet Parker?

A. Definitely no.

Q. Did Mr. Parker, who is sitting here behind Mr. Jaureguy, did he appear at any time during the course of your meeting with Stegmann there in the service station on Lost Lake, on the evening of August 13th?

A. He did not.

Q. Or on the 18th? A. He did not.

The Court: On the whole day of August 18th. How about at any time August 18th?

The Witness: Not at any time, your Honor."

(Testimony of Paul Winans.)
(Tr. of R. 902)

"Q. Now, as I understand it, your testimony is that on August 18th, the day that the option was exercised, you did not see Chet Parker?

A. I did not see Chet Parker.

Q. And you say that he did not tell you that from then on you should be dealing with him as he had purchased the option?

A. No, he definitely did not tell me that.

Q. You will say that you did not ask him what he expected, an abstract or title insurance?

A. No, I didn't even see the man. It could not have been.

Q. You will say that you did not tell him that he could not have any title insurance? If he wanted it, he would have to buy it himself?

A. No; definitely not, at any time.

Q. You will say that you did not, on the 18th of August, in his presence, look for your report or pretend to look for your policy of insurance?

A. Most certainly not."

Testimony of Retlaw Haynes
(Tr. of R. 1041-4)

"Q. Would you tell us about when you got down from Lost Lake back to Dee where Mr. Winans' home was, just roughly now.

A. Well, I guess around six o'clock.

Q. You had surveyed up there as long as you were able to see in the trees? A. Yes, sir.

Q. And then drove down. Now, did Stegmann and

(Testimony of Retlaw Haynes.)

this man that was with Stegmann and the rest of you all come down at the same time? A. Yes.

Q. All right, now, tell us what Mr. Winans and Stegmann were doing after they got down to Mr. Winans' place?

A. Well, I don't know what they were doing because Paul asked us to wait outside while he finished some business.

Q. Then that is what you were doing, you were waiting outside, and they were in a little service station building, weren't they? A. Yes.

Q. They were in, evidently to transact some business while they were in there?

A. That is what I understood they were doing.

Q. Well, did you see them handling any papers while they were in there?

A. No, I wasn't looking in the window. I was sitting out there waiting.

Q. You were sitting outside waiting for Winans, weren't you? A. Yes.

Q. At any rate, the two of them were conferring in there for about how long?

A. Well, as I remember, about half an hour.

Q. Was it impressed upon your memory for any particular reason that this did occur, Mr. Haynes?

A. Yes.

Q. Well, give us the reason that it impressed on your memory.

A. Well, I was pretty disgusted with having to wait because I was anxious to get home, and Mrs. Winans

(Testimony of Retlaw Haynes.)
brought us over some cool drink to drink while we were waiting.

Q. You were still going to drive back to Portland that night? A. Yes.

Q. You had been rather impatient about the delay?

A. That's right; that's right.

Q. But you were waiting there to receive your compensation? A. Yes.

Q. Would you tell us what happened, I mean, after they broke up their conference in the building, what happened?

A. Well, as clearly as I can remember, they left, and we went in.

Q. Now, who is 'they'?

A. Mr. Stegmann and this other man with him.

Q. But Winans remained there? A. Yes.

Q. Then you and Mr. Bogar went into the building with Winans?

A. Yes, and he wrote out a check.

Q. Then this check was written out for $90 here?

A. Yes, sir.

Q. Made payable to Mr. Bogar? A. Yes.

Q. What did you do then?

A. Well, we took off.

Q. Well, you came out of the building. Where was your car?

A. Well, it was—I don't remember which side of the building it was on or right in front, but it was right close up.

Q. Right close up. As you came out, did you see

(Testimony of Retlaw Haynes.)

anything, any more of Stegmann and this other man?

A. I don't remember of having seen them.

Q. Then you left Dee? A. Yes.

Q. And drove toward Hood River?

A. Yes, sir."

Testimony of Lawrence Bogar

(Tr. of R. 1662-3)

"Q. Will you just tell us what took place after you got back to Paul Winans' place?

A. Well, when we arrived we waited about half an hour, well, maybe about 20 minutes to a half hour while Stegman and Mr. Winans were in the building.

Q. Now what building are you referring to?

A. The building, it is on the left hand side of the road going up. There was an office, he had a desk in the room there. I forget whether it was a home or not.

Q. Walter Stegmann and Paul Winans were in there, you say, for about how long?

A. Oh, I would say 20 minutes, half hour, something like that."

(Tr. of R. 1664)

"Q. After Walt Stegmann and Paul came out of Paul's office, what did you do?

A. We went in the office and figured up the time, and he paid me, paid both of us by check, one check for both of us, and we made arrangements to come back next Saturday and finish up the survey. Mr. Winans gave me his telephone number and said he would like to have us back the next following Saturday.

(Testimony of Lawrence Bogar.)

Q. What time was that, approximately, when you got through and got your check and were ready to leave?

A. Oh, it must have been around eight o'clock, something like that.

Q. Did you leave for Portland when you had finished this and gotten your check? A. Yes.

Q. Now, when you came out of this office, were Walt Stegmann and this other man still there?

A. No, I don't believe they were there. Never saw them.

Q. Was there anyone around there at the time that you left besides Winans and Ross Winans?

A. Not to my knowledge. We waited until they got through with their business so we could go in and get straightened up on our pay that day.

Q. Did you, while you were there, Mr. Bogar, see Mr. Parker, who is the gentleman sitting just behind the attorneys there; did you see him up there on the 18th day of August?

A. I don't believe so, no."

No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,

Appellants,

vs.

TITLE AND TRUST COMPANY, a corporation, PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,

Appellees.

and

WALTER STEGMANN,

Appellant,

vs.

TITLE AND TRUST COMPANY, a corporation, PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,

Appellees.

BRIEF OF APPELLEE TITLE AND TRUST COMPANY, a corporation

On Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, Judge.

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BRIEF OF APPELLEE TITLE AND TRUST COMPANY, a corporation

On Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, Judge.

STATEMENT OF THE CASE

This appeal is taken from a judgment (R. 146-149) which decreed that certain policies of title insurance issued by this appellee (hereinafter called "Title and Trust" or "the title company") to appellant, Chet L. Parker, be cancelled and set aside upon tender back of the premiums paid. Appellants' counterclaim for recovery on the policies was dismissed with prejudice.

By agreement of the parties this action came on for trial by the court sitting without a jury (R. 146). A stipulation of admitted facts was entered prior to trial (R. 97-105). Forty-five witnesses testified orally at the trial and numerous exhibits were received in evidence.

The trial court's opinion states clearly the basis for its decision in favor of Title and Trust. Therein the court declared that the testimony of the Parkers and Stegmann "was shown to be false in many particulars and, when not actually controverted, was highly improbable and, at times, fantastic." (R. 107). Further the court stated ". . . in practically every instance I have come to the conclusion that the testimony of the Parkers and Stegmann was false." (R. 109).

Comprehensive findings of fact and conclusions of law which were thereafter entered (R. 119-145) reflect the court's appraisal of the credibility of the Parkers and Stegmann, and the rejection of their testimony as "false," "highly improbable" and "fantastic." Likewise, the findings reflect the court's belief in and acceptance of the testimony of other witnesses, particularly Paul Winans, Claude Parrott, Joyce Petersen, Retlaw Haynes and Lawrence Bogar, the last four having no interest whatsoever in the controversy.

SUMMARY OF ARGUMENT

1. Under Rule 52 (a) of the Federal Rules of Civil Procedure the scope of review of factual matters is limited to a determination of whether any finding of fact was clearly erroneous.

2. There was ample evidence to support the findings that appellants, knowing of the fatal flaw in the title to the property involved, and knowing that appellee had overlooked the flaw, conspired to defraud appellee by obtaining a title insurance policy in excess of the amount paid for the property, misrepresenting their loss and collecting a profit from the title company.

3. Appellants Parker were under a legal obligation to deal with the title company in the utmost good faith. When they learned that the title company had failed to discover the defect of which they had knowledge, they were under a legal duty to disclose the information which they had and their failure to do so constituted actionable fraud. The title company had a right to rely and did rely on the assumption that appellants were acting in good faith. Any negligence on its part would not bar its right to rescind the contract on the ground of fraud and unilateral mistake known to the appellants.

4. No prejudicial error was committed by the court in admitting evidence of other transactions between Parkers and Stegmann. Such evidence was competent and relevant to prove the relationship between the parties and the motive and intent with which various acts were performed.

5. The failure of appellants Parker to notify appellee of the defect in title constituted a breach of the policy conditions and precludes recovery on the policy. Although it was unnecessary to show that breach of the conditions had been prejudicial, the evidence showed and the trial court found that it was unreasonable and materially prejudicial to the title company.

6. Appellant Stegmann was a proper party defendant and declaratory relief was properly granted as to him. The fact that liability on his part was contingent on what the court might find on certain basic issues in the case did not preclude maintaining the action against him.

ARGUMENT

The Limited Scope of the Court's Review

In their specification of errors, appellants complain of error with respect to over twenty separate findings of fact made by the trial court (App. Br. pp. 6-8). When the errors complained of are analyzed, it becomes crystal clear that appellants' sole complaint is that the trial court believed the testimony given by appellee's witnesses and rejected the version given by the Parkers and Stegmann.

Rule 52 (a) of the Federal Rules of Civil Procedure states in part:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity to the trial court to judge the credibility of the witnesses."

In interpreting Rule 52 (a) the United States Supreme Court has ruled that it is within the exclusive province of the district courts to appraise the credibility of the witnesses (*United States v. Oregon State Medical Society,* 343 U.S. 326, 339, 72 S. Ct. 690, 96 L. Ed. 978; *Walling v. General Industries Co.,* 330 U.S. 545, 67 S. Ct. 883, 91 L. Ed. 1088.) Numerous decisions of this court have followed the settled doctrine that findings which depend upon the credibility of oral testimony will be regarded as conclusive on appeal. (*Wittmayer v. United States,* 118 F. (2d) 808 (CA 9); *Grace Brothers v. Commissioner,* 173 F. (2d) 170 (CA 9); *Ruud v. American Packing & Provision Co.,* 177 F. (2d) 538, 541 (CA 9); *Overman v. Loesser,* 205 F. (2d) 521, 524 (CA 9), cert. den. 346 U.S. 910, 74 S. Ct. 241, 98 L. Ed. 156. The rule giving finality to findings drawn from an appraisal of oral testimony is particularly applicable to a case such as the one at bar, where intent, design and motive play such a large part. In *Earle v. W. J. Jones & Son,* 200 F. (2d) 846, 848, this court quoted the following from *United States v. Yellow Cab Co.,* 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."

THE SCHEME TO DEFRAUD

It is our view that Rule 52 (a) is determinative of all fact questions raised on this appeal, for appellants have not pointed out wherein any finding was clearly erroneous. Appellants' argument on the facts is misleading be-

cause they have selected only *some* of the evidence on *some* of the facts and have discussed it out of context with other pertinent facts. The evidence upon which they rely is primarily the testimony of the Parkers and Stegmann, which was found to be false. While it may seem fantastic that anyone would pay out nearly $100,000 in pursuance of a fraudulent scheme, we believe that no one can read the record in this case without becoming convinced that this is precisely what happened; and, moreover, that it was a scheme cleverly devised, played for high stakes, with no apparent risk, and missed success by a whisker.

Like most cases of conspiracy to defraud, no adequate appraisal can be made here of the weight or meaning to be attributed to isolated acts or statements of the conspirators. Reviewed, however, within the framework of other facts established by competent evidence, the meaning becomes clear and unmistakable and the acts in question fall into their proper place within the fraudulent scheme. It may be of assistance to the court, therefore, to set forth at the outset of this brief at least an outline of what we believe, and what the court found to be the fraudulent scheme. Other pertinent facts will be mentioned during the course of the argument.

The property involved in this case is situated on the shores of Lost Lake in Hood River County, Oregon. The nature of this property can best be understood by the editorial appearing in a Hood River newspaper after Parkers had acquired the property and it became known

that this property, so highly esteemed for its recreational use, was to be exploited for its timber values (Ex. 15-A, R. 1925). The property consisted of Lot 1, comprising about 26 acres, which was owned in fee by the Winans family, and Lot 2, comprising 40 acres adjoining. While the Winans family had asserted claim to Lot 2 for many years, they were well acquainted with the fact that the title thereto was fatally defective and that an Act of Congress would be necessary to obtain title. They had in fact, some years before, collected a substantial amount from another title insurance company because of the unmarketability of the title to Lot 2. The Winans had a sentimental attachment for Lot 1 and regarded it as having a large potential value for resort and residential property.

In July, 1951, appellant Stegmann, who had long acted as agent and "front man" for the Parkers in buying and selling timber and finding "deals," learned of the Winans' property. Masquerading as a wealthy stockman looking for a private retreat on which to build a family home, Stegmann approached Paul Winans and expressed a desire to purchase the property on the lake shore. Winans explained the title difficulty on the forty-acre tract and that for this reason he could not sell it, but stated that they might be willing to sell Lot 1 for $80,000, reserving, however, some lots for family use along the lake shore. He also explained that he had previously collected $3000.00 on a title insurance policy because of the unmarketability of title to Lot 2. When Stegmann insisted on buying Lot 2 as well, in order to prevent someone else from cutting the timber and spoil-

ing his private retreat, Winans agreed that the family would include whatever interest it had in Lot 2 for an additional price of $20,000.

After conferring with Parker, Stegmann took an option in his name to buy both tracts for a purchase price of $100,000. The interest of the Parkers in the transaction was not revealed and Stegmann made a $1,000 payment on the option by his personal check on a McMinnville bank. Stegmann was in fact insolvent, had no bank account anywhere, and this check was, by arrangement of the Parkers with their bank, charged to the Parkers' bank account.

On August 13, Chet Parker ordered a title report from appellee. He and Stegmann then visited the property and called on forest service officials to inquire about the title.

On August 16, Parker obtained the title report and learned that Title and Trust had made the same error as the previous title company. It was now apparent that a large amount of money could be made by a "deal" on the property at the expense of the title company. It was at this point that the major details of the plan to defraud were devised. The essentials of the scheme were:

1. They must acquire title to the property.

2. They must in some manner inflate the apparent investment so that they could collect more from the title company than they had paid for the property.

3. They must continue to conceal Stegmann's agency in order to insulate Parker from the knowledge which Winans had imparted to Stegmann concerning the title and also to facilitate their scheme to inflate the apparent loss resulting from the defect in title.

Phases 1 and 3 were accomplished by having Stegmann pay the balance due on the property and close the deal with the Winans. The balance paid when the deed was delivered was $95,000, but a refund check of $4750 was given by the Winans in payment for the reserved area, thus reducing the final payment to a net of $90,-250.00. During these negotiations Parkers' interest was carefully concealed, the deed was taken with the grantee's name in blank and the Winans family did not even know that Parkers were the purchasers until after the deed had been recorded. Even Abraham, the attorney employed by appellants to close the deal, was led to believe that Stegmann was the buyer and did not learn that he represented Parkers until he delivered the deed (R. 932, 935, 938, 939, 940).

Phase 2, the inflation of the apparent loss suffered when the flaw should be discovered, was attempted by two means. The Parkers attempted to sell the property to Multnomah Plywood Corporation for $180,000, in order to show a substantial loss of profit. In addition, a document was drawn up by which Stegmann purported to assign the option to Parkers for $25,000. To aid in the deceit this document recited that Lot 2 was valued at $90,000, thus boosting its apparent value from the $20,000 discussed between Stegmann and Winans.

The Parkers then executed a check for $25,000 payable to Stegmann, which they *deposited* in their own bank account. In this manner they acquired a cancelled check apparently proving that they had paid Stegmann $25,000 for the option.

Before closing the transaction with Winans and paying the balance of the purchase price Parker delivered the spurious assignment to Title and Trust Company and obtained a purchaser's policy in the amount of $125,000. This was exchanged for an owner's policy after the deed had been recorded. The title company discovered its mistake shortly before issuance of the owner's policy, but believing the Parkers to have been innocent of any wrong, it issued the owner's policy without any additional consideration in accordance with its previous agreement (R. 176, 196, 197).

Negotiations then commenced for a settlement on the title policy. The Parkers represented their loss to be $120,300. The company was willing to pay this amount and tendered a contract to that effect (Ex. 9). However, the contract would have required the Parkers to cooperate in a suit to rescind and to recover the purchase price from Stegmann and Winans. The Parkers refused to authorize a suit against Stegmann and ultimately the title company became suspicious of the relations between the Parkers and Stegmann. Inquiry at Hood River also disclosed information indicating that the Parkers and Stegmann had known from the beginning of the title flaw. The company therefore instituted this action for a declaration of rights and cancellation of the policies.

In depositions before trial Stegmann insisted that he had cashed the $25,000 check, but became hopelessly involved in trying to explain how he had spent the money (R. 1939-1946). When the depositions were resumed after several weeks recess Stegmann completely changed his story, said he had returned the check to the Parkers to apply on a loan of $22,000 which he claimed the Parkers had made to him in November of 1950 (R. 1946-1949). This transaction was also verified by the Parkers. When asked for documentary proof of such a loan, the Parkers produced a note and a mortgage, unrecorded, on personal property which probably was nonexistent. They told a fantastic story of having obtained the money from their safety deposit box which they turned over to Stegmann in cash. They evaded efforts to check on their story through safety deposit entry records by the story that they had for some time kept the money in a commode in their home in anticipation of such a loan.

Stegmann, attempting to support the story, floundered badly and was unable to explain what had been done with the proceeds of the alleged loan. The testimony of the Parkers and Stegmann concerning this loan and concerning the $25,000 check was obviously and flagrantly false. With the demise of this story it became evident, of course, that Stegmann had acted throughout as agent for undisclosed principals, the Parkers.

Knowledge of Parkers and Stegmann Concerning the Flaw in Title:

Appellants contend that they did not know of the flaw in the title and that the finding concerning such knowledge is not supported by substantial evidence. Further, they contend that at most they knew merely of a technical defect. They admit, indeed assert, that Paul Winans knew in intimate detail the nature of the flaw, but deny that there was evidence that such information was imparted to them. On pages 16-20 of appellants Parkers' brief they set forth what they claim to be all of the evidence showing the nature of the knowledge which the Parkers had concerning the defect. This statement is incomplete and inaccurate.

The testimony was that the Winans regarded their family's interest in Lot 2 as a mere "equity", arising from the fact that they had held the property and paid taxes on it for many years (R. 862). From the very beginning Paul Winans told Stegmann all about the nature of the flaw and the fact that title could not be obtained except through an Act of Congress (R. 797, 802); that the family did not own title to all of the property and that forty acres of it was not in a condition to offer for sale (R. 797); that he had collected substantial damages from a title company because of the unmarketability of the title to Lot 2 (R. 798). On August 31, he gave this same information to the appellant Parker, who had been introduced to him as a surveyor, even mentioning the Supreme Court decision which rendered the title invalid, and that he had employed an attorney

to attempt to get a private bill through Congress (R. 830-833).

Before the balance of the purchase price was paid and the deed delivered Winans again referred to the flaw in title in conversation with Stegmann and requested that he sign a document reciting that the conveyance was subject "to any and all alleged claim or claims of the United States Government" which Stegmann refused to sign because "it would be the same as admitting that I know the title to that forty acres is no good" (R. 841, 914, 1716, 1717).

Again, when the deed was delivered and the balance of the purchase price paid, Winans and his attorney, Vawter Parker, informed appellants Parkers' attorney, Kenneth Abraham, of the title situation and suggested that it would be easier to get Congressional action if the deed were not recorded and application made in the name of Winans (R. 847, 943). Mr. Abraham did not, as stated by appellants, tell Mrs. Parker that there was nothing to worry about. To the contrary, he was concerned about the information (R. 962) and related it to Mrs. Parker, but she replied that she was satisfied with the title (R. 947, 948, 959).

The knowledge of the appellants concerning the flaw in title is also shown circumstantially by the fact that Parker ordered a title report before he had even seen the property and before he claims to have taken the assignment of option. On the same day he and Stegmann examined the property, Lot 2 of which was posted

with signs advising that it was part of the Bull Run Water shed of the Mt. Hood National Forest (R. 1052).

On the same day Parker and Stegmann called at the forest ranger station and inquired about the title to the property as well as the signs above mentioned. When told that the ownership of Lot 2 was in question, Parker suggested that the way to find out whether the Government owned the timber was to cut down a tree (R. 1050, 1051, 1068).

It is true that appellants denied having received such information, but the trial court found their testimony in this regard to be false and unworthy of belief. It is thus apparent that there was ample and sufficient evidence upon which the court could base its finding that appellants not only knew of the defect in title, but that they had accurate and complete information concerning the nature and serious character of the flaw. Any argument to the contrary involves weighing the credibility of witnesses and accepting appellants' testimony rather than that of other witnesses.

Legal Obligation to Title Company of Applicant for Title Insurance:

The legal question thus presented is whether a person possessed of such knowledge concerning a serious flaw in the title to real property and knowing that the title company has failed to detect the flaw, is under any obligation to advise the title company of its mistake. Preliminary to a discussion of this legal question it will

be well to point out certain inaccuracies in appellants' factual statement and certain points which distinguish this case from the ordinary situation involving title insurance:

1. As pointed out above, the knowledge which appellants had was not, as suggested, of a mere technical defect or a mere rumor of an unsubstantial defect, but was positive, unequivocal and corroborated information as to a defect so serious as to amount to a failure of title.

2. Appellants knew that the property was claimed by the United States as part of a national timber reserve and that it was located in the heart of a recreational area; and, therefore, that the chance of obtaining a grant from Congress for the purpose of logging the timber was virtually nonexistent.

3. The suggestion that appellants were uneducated laymen and therefore presumably unable to comprehend the seriousness of the title flaw is without foundation in fact. Some of our most successful confidence men can boast of little in the way of formal education. The shrewdness of the Parkers in business transactions is demonstrated by their income tax returns (Ex. 49-54; R. 2124-2161). Parker estimated that he invested from $100,000 to $125,000 each year in timber for resale and that he had engaged in approximately fifty of such transactions, in half of which he had obtained title insurance and in the other half abstracts of title (R. 273, 275). He even professed to know that a school land title would fail if it had not been completely surveyed;

and that he always carried a map and checked on whether or not a school land section had been surveyed (R. 1807). The Parkers had also had considerable experience in collecting substantial losses from insurance companies (R. 2187, 2195, 2129, 2141).

4. This is not, as suggested, a case of property purchased in good faith in reliance upon a title company's assurance as to title. The purchase of a title policy here did not have the usual purpose of protecting from an unexpected contingency. What ordinarily would be a contingency was here a certainty and the only purpose of the policy was to give appellants a fund from which to realize a fraudulent profit. Discussion of the legal question, therefore, should not be clouded by consideration of what appellants' duties were before they discovered that the title company had missed the flaw, or what their duties would have been had their knowledge been confined to unsubstantial rumors of a title defect, or even what the duties would have been if they had been induced by the title company's opinion to believe the title to be valid. Under the facts as found by the court and supported by substantial evidence none of these fact situations is present here.

The legal question, therefore, may be restated to be: Will a person who knows that the thing which he seeks to insure is nonexistent and who, therefore, purchases insurance not to protect against an unexpected contingency but for the express purpose of realizing a profit by collecting on the policy, be permitted to capitalize on a mistake of the insurance company, whether or not

negligent? We believe it evident that to sustain this proposition the courts would be lending their aid to the enforcement of a fraudulent scheme. Appellants have cited no cases, and we doubt whether any exist, supporting any such doctrine.

Appellants apparently assert that the parties in this matter were dealing at arms' length, that they must look out for themselves, and that mere silence is not fraud (App. Br. pp. 24-25). They concede, however, that there are cases where no affirmative representation is required, these being cases where there exists a duty to disclose.

First of all, under Oregon law appellants and appellee were not dealing at arm's length. The Supreme Court of Oregon has held that a contract guaranteeing a title is one of insurance rather than suretyship, so that it is governed by the rules applicable to other insurance contracts (*DeCarli v. O'Brien,* 150 Or. 35, 41 P. (2d) 411).

The rule announced by the late Chief Justice Stone in *Stipcich v. Metropolitan Life Ins. Co.,* 277 U.S. 512, 48 S. Ct. 512, 72 L. Ed. 895, is representative of the Oregon law. That case originated in the Circuit Court for Clatsop County, Oregon and was removed to the United States District Court. The plaintiff sued to recover the proceeds of a life insurance policy. The company's principal defense was that the insured, after applying for the policy and before delivery of the insurance and payment of the first premium, had suffered a recurrence of a duodenal ulcer which later caused his

death, and that he failed to reveal this information to the company. At trial, a verdict was directed for the company (8 F. (2d) 285) on the ground of the failure of the insured to disclose.

The case was reviewed by the United States Supreme Court on certified questions of law, and the judgment was reversed on the ground that the trial court had erred in excluding evidence of a disclosure made by the insured to an agent of the company. However, the rule requiring disclosure was succinctly stated:

> "Insurance policies are traditionally contracts uberrimae fidei and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. Carter v. Boehm, 3 Burrows, 1905; Livingston v. Maryland Insurance Co., 6 Cranch, 274, 3 L. Ed. 222; McLanahan v. Universal Insurance Co., 1 Pet. 170, 7 L. Ed. 98; Phoenix Life Insurance Co. v. Raddin, 120 U.S. 183, 189, 7 S. Ct. 500 (30 L. Ed. 644); Hardman v. Firemen's Insurance Co. (C.C.) 20 F. 594."

The term "uberrimae fidei" is defined as follows in Black's Law Dictionary (4th Ed.) p. 1690:

> "The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight. A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made; for example in the case of insurance, the insured must observe the most perfect good faith towards the insurer."

The special character of insurance contracts as uberrimae fidei thus distinguishes virtually all of the cases cited by appellants. They are, for the most part, cases

dealing with arm's length transactions, where the rule of caveat emptor and analogous rules have been applied. However, even in arm's length transactions, the duty to disclose frequently arises.

The doctrine of nondisclosure, as a species of fraud, is well summarized in the American Law Institute's Restatement of the Law of Restitution, § 8, Comment (b), p. 33:

> "Non-disclosure is a failure to reveal facts. It may exist where there is neither representation or concealment. Except in a few special types of transaction such as insurance contracts and transactions between a fiduciary and his beneficiary, there is no general duty upon a party to a transaction to disclose facts to the other party. However a person who stands in a fiduciary or confidential relationship to the other party has a duty to reveal all relevant facts (see Restatement of Agency, § 390, Restatement of Trusts, § 170 (2)). *Likewise, a person who, before a transaction is completed, knows or suspects that the other is acting under a misapprehension which, if the mistake were mutual, would cause the transaction to be voidable, is under a duty to disclose the facts to the other.* * * *
> *"Where the parties contract on the basis that there is a risk of happening of an event or the existence of a condition which would make the subject matter more valuable, or less valuable, and one of them has knowledge that the event has happened, or that the condition exists, it is fraudulent non-disclosure for him to fail to reveal this fact to the other party."* (Emphasis supplied)

In the instant case, the court has found as a fact that after being apprised of appellee's failure to learn of the government's claim to Lot 2, appellants entered into a conspiracy to defraud appellee by inducing appellee to

issue to the Parkers a policy of title insurance, and to collect the amount of such insurance on account of the failure of title. The findings further state that pursuant to and in furtherance of this conspiracy the Parkers falsely represented to the title company that they had paid $25,000 for the option on the property, that the value of Lot 1 was $35,000 and Lot 2 was $90,000, and wilfully and intentionally concealed and failed to disclose their knowledge of the defect, knowing that appellee had failed to discover the defect; and that it would issue the policy in ignorance thereof and in reliance upon the apparent good faith of the Parkers (R. 136-138).

Thus the failure to disclose was a deliberate withholding of information which they knew appellee did not have, and was done for the purpose of deceiving and defrauding appellee. It was only one of many acts which appellants Parker and Stegmann undertook to accomplish their fraudulent scheme, and would fall squarely within the rule above quoted, even if the parties had been dealing at arm's length.

In this connection we call the court's attention to the recent Oregon case of *Musgrave v. Lucas,* 193 Or. 401, 238 P. (2d) 780. This was an action by the vendees against vendors to recover damages on account of fraud in the sale of a sand and gravel business adjacent to a navigable river. The complaint, to which a demurrer was sustained by the lower court, alleged in substance that the defendants had concealed the fact that they had no permit from the Government to dredge gravel and sand from the river and had been notified by the

Corps. of Engineers that further removal of sand and gravel in that area would not be allowed. In reversing the judgment and holding the complaint to be invulnerable to attack by demurrer, the Oregon Supreme Court ruled (p. 410):

> "Actionable fraud may be committed by a concealment of material facts as well as by affirmative and positive misrepresentations. In 37 CJS, Fraud, 244 § 16 a., it is said:
>
> > 'An exception to the rule that mere silence is not fraud exists where the circumstances impose on a person a duty to speak and he deliberately remains silent. It is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation. Where the law imposes a duty on one party to disclose all material facts known to him and not known to the other, silence or concealment in violation of this duty with intent to deceive will amount to fraud as being a deliberate suppression of the truth and equivalent to the assertion of a falsehood.' "

This case cannot be distinguished, as appellants would do, on the ground that the facts concealed were not available to the other party. The statute required a permit to dredge in the river and its existence or nonexistence was readily available from Government records. Yet the duty to disclose was found to exist although the contract was one where the parties dealt at arm's length.

Of course there is even greater reason to apply the rule in insurance cases where the relation requires the utmost good faith. In *Arthur v. Palatine Insurance*

Company, 35 Or. 27, 57 P. 62, suit was commenced to recover upon a policy of fire insurance. Part of the real property was encumbered by mechanics' liens and the personal property by a chattel mortgage. The policy provided, in part, that it would be void if "the subject of insurance be personal property, and be or become uncumbered by a chattel mortgage," and "if the insured had concealed, or misrepresented, in writing or otherwise, any material fact or condition . . ." The insurer claimed that the policy was void because the liens and encumbrances were material to the risk and were concealed by the insured, and because it had no knowledge of the chattel mortgage.

A jury verdict for plaintiff was affirmed on appeal and the court in its opinion discussed the correctness of the trial court's charge. The trial court had charged the jury that the failure of the assured to inform the defendant of liens and encumbrances would not render the policy void *unless it was intentional and with the design to defraud.* The instructions were approved in a well-written opinion by Chief Justice Bean. In the case at bar the court's findings do affirmatively establish an intentional failure on the part of the appellants to advise appellee of the defect in Lot 2, for the purpose of perpetrating a fraud.

A New York decision which aptly illustrates the principle of fraudulent nondisclosure in connection with the issuance of a title policy is *Vaughn v. United States Title Guaranty & Indemnity Co.,* 137 App. Div. 623, 122 N.Y.S. 393 (App. Div. 1st). In that case plaintiff

employed an attorney to get a deed for him covering some property owned by one, Maria Hanley, whose whereabouts were unknown. The attorney delivered to the plaintiff an instrument purporting to be such a deed and applied for a policy of title insurance on plaintiff's behalf. A few months later a condemnation suit was instituted against the property and it was adjudicated that the deed vested no title in the plaintiff. He then sued the title company and a verdict was directed in his favor by the trial court.

On appeal, the Appellate Division reversed on the ground that the defendant should have been allowed to go to the jury on the question whether plaintiff had fraudulently concealed facts tending to show that he did not have good title. The court said (122 N.Y.S., p. 394):

> "The inference is almost irresistible that, when the plaintiff applied for the insurance, he had knowledge of all the facts upon which it was adjudicated in the condemnation proceedings that he did not have title. He asks to recover in this action upon the ground that a deed, procured by his agent, was a forgery. It is not difficult to infer that said deed was procured in anticipation of the condemnation proceedings, and it is certain that the contract of insurance in suit was obtained because the plaintiff knew that there was at least doubt of the validity of his deed. The defendant, upon issuing the title insurance, naturally assumed that the plaintiff's deed was genuine, and the concealment of facts within the plaintiff's knowledge, tending to show that it was not, was as fraudulent as affirmative misstatements. The plaintiff's conduct was equivalent to a representation that, so far as he knew, the deed presented by him was genuine."

On the other hand, appellants seem to consider important a New York Court of Appeals case entitled *Empire Development Co. v. Title Guarantee & Trust,* 225 N.Y. 53, 121 N.E. 468 (App. Br. pp. 34-35). That case involved no element of fraud. Both contracting parties were aware of the encumbrance involved and the question concerned coverage of the policy. The language quoted by appellants demonstrates the difference in the fact situations there and here:

> "To a layman, a search is a mystery, and the various pitfalls that may beset his title are dreaded, but unknown. To avoid a possible claim against him, to obviate the need and expense of professional advice, and the uncertainty that sometimes results even after it has been obtained, is the very purpose for which the owner seeks insurance."

No doubt this statement is usually true in title insurance matters. But Parkers' purpose was neither to avoid possible claims (which they knew were inevitable) or to obviate the need for professional advice (which would have been worthless to the purpose which they had in mind). Unlike the usual situation, they bought the insurance not to guard against an unexpected contingency but to make a profit off of the title company.

The foregoing serves to distinguish all of the authorities cited by appellants on the question of fraudulent concealment. In none of them was there a finding supported by evidence that the purchase of insurance was attended with knowledge and concealment of material facts with intention to defraud.

RELIANCE

Appellants next contend that fraud was not proven because appellee had no right to rely and did not rely upon their failure to disclose the facts surrounding the government's claim to Lot 2. They urge that appellee made its own investigation of the records and relied exclusively on its own search.

Appellants' assertion that there was no right to rely on the Parkers' silence concerning the title defect is not supported by any authority. The cases which they cite involved fact situations where there was no duty to disclose, which is not this case. Every duty to another carries with it, as a necessary corollary, the right of such other party to assume that it will be performed. If this were not so, there could be no such thing as fraudulent concealment, for it would never be possible to show reliance on anything more than the failure to disclose.

Contrary to appellants' contention that there was in fact no reliance, the trial court found that appellee had relied not only upon the examination which it made of its own records and the public records of the State of Oregon, but also upon the apparent good faith of the Parkers and its belief that the Parkers knew of no fact or circumstance which would impair the title to the property (R. 138).

While it may be true that a title company does not rely primarily upon the customer to tell it about title defects, it always relies, as does every insurance carrier, on the good faith of its customers. This means that it is

entitled to and does assume that the customer honestly wants assurance that his title is good and wants the policy only as indemnity against unknown contingencies; that he in good faith hopes to own specific property and is not seeking merely a means of making a profit by virtue of an error which he knows the title company has made.

In the instant case the appellants owed an affirmative duty to disclose to appellee the serious title defect, of which they had full knowledge, because it went to the very essence of the risk which appellee contracted to insure. The fault here is that they remained silent with the knowledge that appellee had failed to find the fatal flaw in the title; that it would not issue the policy if the government's claim to Lot 2 were disclosed; and with the intention of making a profit from the error. Here lies the so-called intent to deceive; the inducement of action through nondisclosure is the fraud. The action taken by appellee in issuing the insurance was in reliance upon the failure to disclose and the illusion thus created by appellants that they knew of no fact which would render the transaction other than regular in all respects.

Of course, appellee is not precluded from relief because it conducted an investigation of the public records, a search which did not reveal the defect in title and which was completed before appellants framed their fraudulent scheme. It is a rule of universal application that it is not necessary to the predication of fraud that a misrepresentation be the sole cause or inducement

of the contract or transaction, and the only element relied upon. It is enough that it may constitute a material inducement (23 Am. Jur. § 145, p. 946 (collecting cases).) The American Law Institute's Restatement of the Law of Torts (Vol. 3, § 546, comment a) states:

> "It is not necessary that the other's reliance upon the credibility of the fraudulent misrepresentation be the sole or even the predominant factor in influencing his conduct; it is enough that he would not have acted or failed to act as he did had he not relied upon a misrepresentation as true or probably true."

Of course the rule is no less true where the fraud consists of fraudulent concealment rather than affirmative misrepresentation. As stated in *Vaughan v. United States Title Guaranty & Indemnity Co.,* supra, and *Musgrove v. Lucas,* supra, concealment where there is a duty to speak is equivalent to an affirmative misrepresentation.

With respect to independent investigations by insurers as lessening the right to avoid the policy for fraud, the textwriters of American Jurisprudence lay down the following rule (29 Am. Jur. (Cum. Supp.) § 543.5, p. 63):

> "The few cases in which the question was squarely before the court support the rule that an independent investigation by the insurer does not in itself lessen the right of the insurer to avoid the policy because of misrepresentations made by the insured in his application, except where the independent investigation either discloses the falsity of the representations or discloses facts which place upon the insurer the duty of further inquiry."

In the instant case the evidence is uncontradicted that the independent investigation did not disclose the flaw in the title.

Appellants contend, however, that since the flaw could have been discovered, appellee's negligence will preclude it from preventing the perpetration of the fraud. Whatever might be the rule of early cases relied upon by appellants, the Oregon Supreme Court in *Larsen v. Lootens,* 102 Or. 579, 591, 194 P. 699, 203 P. 621, first noted the evolution of the law in the direction of punishing defrauders rather than their negligent victims. In that case, the court stated (pp. 591-592):

> "The books teem with decisions respecting the effect of an independent investigation by the purchaser, upon the weight to be attached to false representations by the vendor. The earlier decisions held the purchaser to a very strict rule in such case, apparently upon the theory that in the long run it was better public policy to discourage negligence and carelessness than to punish fraud. Concerning this attitude of the early courts and the progress made to a more equitable rule, a recent work remarks:
>
> > " 'The policy of the courts is, on the one hand, to suppress fraud, and, on the other, not to encourage negligence and inattention to one's own interests. The rule of law is one of policy. Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has obvious dangers. But judicial experience exemplifies that the former is the less objectionable, and hampers less the administration of pure justice. The law is not designed to protect the vigilant, or tolerably vigilant, alone, although it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly

> wicked. The courts, however, are not entirely in accord as to the circumstances under which fraudulent representations may be relied on, although it cannot perhaps be denied that negligence as a defense in cases of fraud has been in danger of being pushed too far. There would seem to be no doubt that while, in the ordinary business transactions of life, men are expected to exercise reasonable prudence, and not to rely upon others, with whom they deal, to care for and protect their interests, this requirement is not to be carried so far that the law shall ignore or protect positive, intentional fraud successfully practiced upon the simple minded or unwary.' "

In *J. C. Corbin Co. v. Preston,* 109 Or. 230, 249, 212 P. 541, 218 P. 917, the court enunciated the rule that one who misrepresents will not be permitted to say to his defrauded vendee, "You were yourself guilty of negligence." In *Paulson v. Kenney,* 110 Or. 688, 224 P. 634, the court remarked that it was a poor answer to a charge of fraud for the wrongdoer to urge that the person defrauded should have watched more closely to avoid being the victim of his trickery (see also *Outcault Advertising Co. v. Jones,* 119 Or. 214, 234 P. 269, 239 P. 1113, and *Horner v. Wagy,* 173 Or. 441, 463, 146 P. (2d) 92, quoting from *J. C. Corbin Co. v. Preston* (supra).)

UNILATERAL MISTAKE KNOWN TO APPELLANTS

As mentioned above, the authorities cited by appellants to show that appellee had no right to rely on appellants' silence are cases involving arm's length transactions, such as sales of property, construction contracts and employment contracts, where the rule of caveat emptor and similar rules were invoked. Of course, these cases are not relevant in an action such as this where the parties are required to deal with each other in utmost good faith. However, even in arm's length transactions, as we have seen, rigid common-law rules are relaxed and the duty to disclose arises when one party discovers that the other is acting in ignorance of material facts. Restatement of the Law of Restitution, § 8, Comment (b), p. 33; *Musgrave et al. v. Lucas et al.,* 193 Or. 401, 238 P. (2d) 780.

Additional examples are found in other cases where equity has granted relief against parties who knew and sought to take unconscionable advantage of the other party's inadvertent error. Although the same result has been achieved, the courts in these cases have not found it necessary to search for elements of fraud. Thus, in *Rushlight Co. v. City of Portland,* 189 Or. 194, 219 P. (2d) 732, a contractor, by mistake, submitted an abnormally low bid which the city accepted although it had ample reason to suspect the error. Affirming judgment for the contractor, the court said:

> "We believe that in this State an offer and an acceptance are deemed to effect a meeting of the

> minds, even though the offeror made a material mistake in compiling his offer, provided the acceptor was not aware of the mistake and had no reason to suspect it. But if the ofleree knew of the mistake, and if it was basic, or if the circumstances were such that he, as a reasonable man, should have inferred that a basic mistake was made, a meeting of the minds does not occur. The circumstances which should arouse the suspicions of the fair-minded offeree are many, as stated in § 94 of Williston on Contracts, Rev. Ed.: '* * * And the same principle is applicable in any case where the offeree should know that the terms of the offer are unintended or misunderstood by the offeror. The offeree will not be permitted to snap up an offer that is too good to be true; no contract based on such an offer can then be enforced by the acceptor.' "

This court in *United States v. Jones,* 176 F. (2d) 278, 285, a case originating in Oregon but controlled by federal law, noted the modern tendency to recognize unilateral mistake as a ground of rescission and cited such authorities as Williston on Contracts, Section 503 of the Restatement of the Law on Contracts, and Section 12 of the Restatement of the Law of Restitution, all of which were discussed and followed by the Oregon Supreme Court in the later *Rushlight* case.

Like the fraud cases above cited, mere negligence is no defense to the application of this rule. In the *Rushlight* case, the plaintiff was a large general contractor. In submitting a written bid on a sewer disposal project, the computation of the reinforcing steel required in the plans and specifications was omitted. This was a $100,000 item which aggregated over 15 per cent of the correct bid. Yet, even such a gross error was not deemed to

bar relief, the court saying in that regard (189 Or. at p. 205):

> "One who considers in the cloistered calm of appellate chambers the mistake which the plaintiff made is prone to indict. Tranquil repose magnifies mistakes made by those who work under stress and strain. It is even inclined to condemn alacrity and insist upon such methodical care that error will be virtually eliminated. Courts, however, cannot create a Utopia and must deal with the realities of life."

The rule that negligence is not a defense is stated in the Restatement of the Law of Restitution, Section 59, as follows:

> "A person who has conferred a benefit upon auother by mistake is not precluded from maintaining an action for restitution by the fact that the mistake was due to his lack of care."

This authority was quoted with approval by the Oregon Supreme Court in *Holzmeyer v. Van Doren,* 172 Or. 176, 139 P. (2d) 778, in which the court said:

> "Some mistakes prejudice no one except those who commit them, and, therefore, cancellation will prejudice no one. In such a case a considerable degree of carelessness can be tolerated."

This principle was reaffirmed in *Edwards Farms v. Smith Canning & Freezing Co.,* 197 Or. 57, 251 P. (2d) 133, where the court said:

> "It is true that gross negligence in some cases will preclude the relief of reformation, but this is not always so, for, as stated in *Holzmeyer v. Van Doren,* 172 Or. 176, 189, 139 P. 2d 778, a universal formula cannot be adopted which will define the degree of carelessness which would bar a party from the right to seek equitable relief."

It is obvious, of course, that appellants were not prejudiced by the mistakes of appellee, for they knew the facts and could readily have corrected the error. It is likewise obvious that however the mistake may be characterized, it certainly was not gross negligence. The official real property records of Hood River County disclosed a perfect chain of title from the State of Oregon to Winans and there was no record of the title defect in that county (F. VIII, R. 122). As conceded by counsel for appellants, the legal point establishing the flaw in title was obscure and "probably very few lawyers cognizant in the general rules regarding school lands would, upon examination of the abstract in evidence (Ex. 315; R. 1899, 2266-8), have failed to pass the title" (App. Br. p. 21).

The necessary elements of this rule—mistake by one party and knowledge by the other—are present here. The fact that appellants thereafter paid the balance of the purchase price does not alter the application of the rule, for they did so with knowledge of the mistake. Under these circumstances, the rule announced by Professor Corbin in his new treatise (3 Corbin on Contracts, § 606, p. 412, note 3) is directly applicable:

> "A change of position does not prevent rescission or reformation for mistake if it occurred with full knowledge of the mistake on the part of the defendant. Taking advantage of the mistake after it was made is as bad as not preventing the mistake when it occurred."

Obviously, the completion of the transaction and the payment of the purchase price was a deliberate risk taken by appellants for the express purpose of reaping

a greater reward through a claim against appellee on the policy. The consequences of this "change in circumstances" are more fully set out in the American Law Institute's Restatement of Restitution (§ 142 and comments (c), (d) and (e)):

"§ 142. Change of Circumstances.

"(1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

"(2) Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.

"(3) Change of circumstances is not a defense if

"(a) the conduct of the recipient in obtaining, retaining or dealing with the subject matter was tortious, or

"(b) the change occurred after the recipient had knowledge of the facts entitling the other to restitution and had an opportunity to make restitution."

* * *

"c. *Fault.* If the recipient has been fraudulent or guilty of duress not only is a defense of change of circumstances barred by the fact that his conduct was tortious but also because of his knowledge of facts from which he had notice of the right of the claimant to the subject matter.

"If either the claimant or the recipient has failed to use care to ascertain relevant facts, such person is at fault within the meaning of this Section. Likewise, a misrepresentation by the recipient, even though innocent, constitutes fault and a change of

circumstances may not bar a claimant who has been guilty of no fault, if the misrepresentation caused the mistake (see the Caveat). If both parties have failed to exercise care, a change of circumstances such that the recipient would suffer loss, or would be likely to suffer loss, may be a bar unless his departure from the standard of care was substantially greater than that of the claimant (as to which see the Caveat).

"In determining whose fault is greater, the circumstances both preceding and subsequent to the transaction are considered. Thus, if, after the transaction but before the loss, either party becomes aware of facts from which, were he careful, he would ascertain that it was entered into under a basic mistake, such failure constitutes lack of due care and is to be considered in the determination of fault."

* * *

"d. *Tortious conduct.* Change of circumstances is not a defense to a person who, however innocently, has been guilty of tortious conduct in receiving, retaining or disposing of the subject matter."

* * *

"e. *Effect of knowledge.* If a person acquired property from another as the result of a mistake and has no reason to know facts which caused the transaction to be voidable, he has no duty with respect to the subject matter and is discharged from liability if, while he knows of no interest which the other has in the subject matter, the subject matter is destroyed. If, however, he subsequently learns facts from which he realizes the existence of a mistake, his failure to notify the other party prevents a subsequent change of circumstances from being a defense."

The fact that the rules of the Restatement of Restitution accord with the law of Oregon is indicated by

the Oregon Supreme Court's approval of the text in many recent cases. Application of these rules to the facts here leads inevitably to the conclusion that to sustain the judgment all that was necessary was that the court find that appellants had knowledge of a substantial defect in the title and knowledge that the title company was issuing its policy under the erroneous belief that no such defect existed. It so found.

EVIDENCE OF OTHER PARKER-STEGMANN TRANSACTIONS

While one specification of error is devoted to the proposition that the court erred in admitting evidence of other transactions involving Parker and Stegmann, appellants implicitly recognize the flimsy character of this specification, inasmuch as the case was tried before the district court sitting without a jury. In fact, appellants have made no attempt in presenting this specification to comply with Rule 18(d) of the Rules of this court requiring that the grounds of objection and the substance of the testimony be quoted (App. Br. p. 9). This is reason enough for disregarding this specification.

Furthermore, it is familiar law that questions as to the admission of evidence "becomes relatively unimportant" in nonjury cases, "the rules of evidence relating to admission and exclusion of evidence being intended primarily for the purpose of withdrawing from the jury matter which might improperly sway the ver-

dict, and not for the judge, who is presumed to act only on proper evidence." *MacDonnell v. Capital Co.,* 130 F. (2d) 311, (C.A. 9), cert. den. 317 U.S. 692, 63 S. Ct. 324, 87 L. Ed. 554 The rule was succintly stated recently in *Rolley, Inc v. Younghusband,* 204 F. (2d) 209, 212 (C.A.9):

> "Error in admission of evidence is harmless, where a case is tried to a court without a jury, if there is sufficient competent evidence to support the court's findings (Citing cases). This rule is grounded upon the presumption that a judge sitting without a jury will not be influenced by irrelevant evidence."

In the case at bar there is sufficient evidence to support the findings irrespective of the alleged erroneous evidence. However, the trial judge properly exercised his discretion in admitting the evidence objected to. The relationship between Parker and Stegmann was one of the basic issues in the case. Were Stegmann and Parker independent businessmen dealing at arm's length, or was Stegmann an agent and "front man" of Parker and a coconspirator in a scheme to defraud? (R. 433-4) Certainly, evidence of other transactions in which Stegmann had acted for Parker, either directly or indirectly, was relevant and proper on this issue. It is well settled in Oregon that an agency may be shown by circumstantial evidence and by a course of dealing, *Co-operative Copper & Gold Mining Co. v. Law,* 65 Or. 250, 132 P. 521; *Boise-Payette Lumber Co. v. Dominican Sisters, etc.,* 102 Or. 314, 202 P. 554; *Held v. Puget Sound & Alaska Powder Co.,* 135 Or. 283, 295 P. 969; *Young v. Neill,* 190 Or. 161, 174, 220 P. (2d) 89.

The evidence as to previous transactions was also admissible with respect to the question of the Parkers' and Stegmann's purpose and intent, in view of the fraudulent scheme charged in the amended complaint. An oft-cited opinion on this subject is *Wood v. United States,* 16 Pet. 342, 41 U.S. 342, 10 L. Ed. 987, where Mr. Justice Story wrote (p. 360):

> "The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act, directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

This rule has been followed in this court in *Jones v. United States,* 265 Fed. 235, 241, aff'd 258 U.S. 40, 42 S. Ct. 218, 66 L. Ed. 453; *Kettenbach v. United States,* 202 Fed. 377; *Himmelfarb v. United States,* 175 F. (2d) 924.

Even where the action is tried by a jury, much latitude is given to the trial court in conspiracy cases. In *Clune v. United States,* 159 U.S. 590, 592, 16 S. Ct. 125, 40 L. Ed. 269, Mr. Justice Shaw said:

> "Where it is sought to establish a conspiracy by circumstantial evidence, much discretion is left to the trial court in its rulings on the admissibility of evi-

dence, and its rulings will be sustained, if the testimony which is admitted tends even remotely to establish the ultimate fact."

Other cases on the point are *Wood v. United States,* 84 F. (2d) 749 (C.A.5); *Phelps v. United States,* 160 F. (2d) 858, 973 (C.A.8) and *United States v. Schneiderman,* 106 F. Supp. 892, 902 (S.D.Cal. Mathes J).

Sufficiency of Proof of Fraudulent Scheme

A large portion of appellant's brief is devoted to discussion of specific items of evidence and an effort to show that the trial court was wrong in finding that there was a scheme to defraud, or that any overt acts were performed pursuant thereto. In substance these present nothing more than an argument that the trial court should have believed appellants instead of the other witnesses.

The contentions cover a varied field including argument why the court should have believed appellants rather than the forest rangers and Winans concerning meetings on August 13 and August 18 (pages 46-48); argument that their misrepresentation as to the amount they had paid for the property was not motivated by fraud because it did not induce the title company to miss the defect and because they could easily have increased their fraudulent gain from $25,000 to $80,000, or perhaps even more (pp 49-51); that the concealment from Winans of Parker's interest in the matter was not illegal, from which the inference is drawn that it could not have been the instrument of fraud (p. 53); that

there were bigger and better ways in which appellants could have consummated their fraud (pp. 55-57), and hence that they must not have had fraudulent intent; and that appellants' "skulduggery" for a long time prior to August 16, 1951, necessarily proves that they couldn't have formed a plan to defraud on that date (p. 57).

We shall discuss only a few of these matters specifically. The argument whether Parker was present at a meeting with Stegmann and Paul Winans on August 18, when the option was exercised, was a crucial incident in the dispute between Winans and appellants. Appellants contended that on this occasion Parker informed Winans that he was buying the property and that from then on Winans would be dealing with him as to everything except the survey of the reserved area. Winans denied that Parker was even present at the meeting, insisted that he had not even met Parker until the latter was introduced to him as a surveyor on August 27, and that he did not know of Parker's interest in the property until after the deed had been recorded. The subject matter of the testimony was such that neither could have been mistaken and one side or the other gave perjured testimony. The court chose to believe Winans and his corroborating witnesses.

Appellants now argue that Parker had no motive to claim that he was at the meeting but, on the contrary, if he had an intent to deceive, it would have better served his interest to deny that he was at the meeting and therefore could not have learned of the flaw in the title. If this were a valid argument, it would be offset by the counter argument that in such case Winans' interest

would have been best served by claiming that Parker had been at the meeting and had been told of the title defect.

The truth of the matter is that by the time Parker testified he realized that he might be chargeable as undisclosed principal with the revelations of Winans concerning the title flaw to his agent, Stegmann. To avoid this he must put Winans on notice of his interest. He could not remove Stegmann entirely from the picture, for Stegmann had handled the survey and the closing of the transaction. The next best thing was to put Winans on notice that the Stegmann agency was limited strictly to surveying the reserved area and the preparation of closing papers. In so testifying he repudiated his previous story that he had seen Winans only once, on a survey trip on August 27 (R. 1771, 1804).

It is next urged that since purchase price is only one evidence of value, there could have been no fraudulent purpose in misrepresenting the amount paid for the property and the value of each lot. Whatever the rule of law, the effectiveness of the misrepresentations is attested to by the fact that they induced appellee to offer payment of $90,000 for the loss on Lot 2, with Parkers retaining Lot 1 (R. 1903); and, when this was rejected, to offer $120,300 (their total claimed investment) for the entire loss (R. 1910).

The suggestion of frivolity in the trial court's finding that the conspiracy was furthered by the appellants' concealment from Winans of Parkers' interest and the fact that they were obtaining title insurance ignores one

important factor: The tendency of Paul Winans to tell anyone and everyone who would listen about the defect in title to Lot 2 and his previous collection of damages from another title company.

Counsel for appellants question that they would have paid nearly $100,000 for a chance to collect a tax-free profit of $25,000 and suggest many things that they would or would not have done if they planned to defraud. No doubt hindsight will suggest many refinements and improvements in most fraudulent schemes. But we should not be overly critical. The fact remains that with all of its alleged deficiencies the plan was good enough that the Parkers could have accepted the settlement, pocketed their profits and laughed at the discomfiture of appellee when it discovered that it had sued the wrong people. Perhaps their failure to do so was their only serious mistake.

Of course no one but appellants can say with certainty why they did or did not do certain things. We suggest the following, however, as a plausible explanation of the questions posed by counsel:

While appellants knew full well of the fatal flaw in the title, they could not be certain prior to receipt of the title report, that appellee would fail to find the flaw. Perhaps they assumed that it would find the defect, although they had good reason to believe that it might not when, on August 13, the title company informed them that there was a policy already outstanding on the property and that its maps showed title to be in Winans (R. 233, 194, 200). But whatever their expectations, it is

pointless to argue that they would not have contemplated investing $100,000 on the chance that appellee would miss the defect (App. Br. p. 55), or that they would have ordered title insurance in a large amount instead of a mere title report (App. Br. p. 55), for they had no intention of investing any such amount, or even of paying the cost of title insurance, on a mere gamble. If they expected the title company to find the flaw, it means only that their plan at that time was something different from the form which it finally assumed.

Perhaps it is idle to speculate on what the plan may have been prior to August 16. But since counsel seem to feel that there is something inconsistent in appellants' actions prior to August 16, and the conspiracy found to exist after that date, we shall consider the matter briefly.

Appellants had what appeared to be a valid and enforceable contract to purchase lands, the title to which they knew was defective. If the title report should disclose the defective title, the Parkers, in the guise of innocent purchasers of the option could present Winans with a substantial claim for damages. If they could negotiate a quick sale, they could add loss of profit to their damage claim. The evidence in this case leaves no room to doubt that they were fully capable of such deception. The fiction of Stegmann as an independent middleman was, of course, essential to the success of such a plan. If, as appellants insist, the assignment of option and the $25,000 check were executed on the date they bear—August 13—then these spurious documents were obviously designed for just such a fraudulent purpose.

If this were the original plan, the receipt of the title report showing marketable title required some rearrangement which could not be done in a day. Before the title company could be substituted as the intended victim, the option must be converted to a contract to purchase by paying the $4,000 due on or before August 18, and agreement must be reached with Winans on the reserve area. This relatively small additional payment could be made without risk for there was ample security in Lot 1. But what was necessary to assure recourse against the title company when the flaw came to light?

Having bought and sold some fifty tracts of timber, on half of which they had obtained title insurance (R. 273, 275), they knew, of course, that they could protect themselves with an owner's policy at the time they paid the balance of $95,000 on the purchase price. They were prepared to make this payment, having on August 9 earmarked $100,000 in a special bank account under the assumed business name of Phillips Construction Company (R. 419). However, on August 29 they learned, whether by design or accident is unimportant, that they could obtain a purchaser's policy.

This type of policy would have had little value to a bona fide purchaser who contemplated, as they did, paying cash and obtaining an owner's policy when the deal was closed. It was of considerable value, however, to appellants. It assured them of recourse against the title company if the talkative Winans should reveal the flaw before the deal was closed, not only for the sums they had paid Winans and the fictitious $25,000 to Stegmann, but for damages that they could claim through

loss of a sale to Multnomah Plywood Corporation. They therefore wasted no time in obtaining the purchaser's policy.

The attempt to negotiate a fast sale for $180,000, perhaps designed originally to prove damages when the title defect appeared, lost none of its attractiveness when the title report was received. If the sale could be made, so much the better. Multnomah Plywood would, of course, obtain a title policy for $180,000 which would eventually assure their profit. No doubt they would have preferred a fast sale for cash, as their counsel suggest, but Multnomah Plywood didn't have the cash. Appellants offer to it, however, would have restored to them more than their entire investment, $100,000, before logging commenced (R. 1422, 1423). They insisted on this, for they knew that the Government would sue when the first tree was cut (R. 1050, 1068). After that they could afford to wait for their profit when settlement was made on the title policy.

It is thus seen that what was done prior to August 16 involves no inconsistency with the fraudulent scheme formed after that date. It is not the title company but appellants who are faced with the dilemma, for they cannot escape the fraud inherent in the spurious assignment of option and the fake $25,000 payment. Whenever and for what purpose these instruments were executed, they could lose none of their effectiveness as instruments of fraud by the substitution of one intended victim for another.

The charge of inconsistency stems from the unwarranted assumption that this was the only fraud perpe-

trated by the appellants and, therefore, that all conduct must be related to the particular scheme. To the contrary, efforts during the trial to investigate the relationship existing between the Parkers and Stegmann and the devious financial transactions between them brought to light many other instances of fraudulent conduct. One of these involved use of the same fictitious loan arrangements which appellants rely on here and, perhaps, therefore deserves some comment.

In May of 1951 a tract of timber known as the Johnson tract was purchased by Stegmann and paid for by means of personal checks charged to Parkers' bank account (R. 413, 414). A few days later it was sold by Stegmann to McCormick Lumber Company for a profit under a contract drawn by the Parkers (R. 666, 766; Ex. 29). The check for the purchase price payable to Stegmann, was endorsed and delivered to the Parkers, who credited the profit as a payment on the fictitious $22,000 loan (R. 667-670; Ex. 35, 36; R. 2097, 2104). The apparent income thus received was no problem to the insolvent Stegmann. The Parkers (in an eighty percent tax bracket), treated the profit as a nontaxable return of capital and reported only a small interest payment (Ex. 49; R. 2124). Even when this sham was exposed at the trial the Parkers insisted that they had had no interest in the Johnson timber.

The foregoing suffices to show the basic fallacy in appellants' treatment of the evidence upon which the trial court found the conspiracy to defraud. It would unduly lengthen this brief to reply in detail to their argument that Parker and Stegmann should be believed and

the disinterested rangers and surveyors disbelieved (App. Br. 46-48); or that a motive or reason expressed by Parker or Stegmann in their testimony must be accepted as a fact for the purpose of their appeal (App. Br. 50, 54); or to point out again in detail that the sham assignment with the segregated values is not claimed to have caused the title company to refrain from a search (App. Br. 51, 52), the search having already been completed and these being merely cogs in the scheme to reap a profit.

BREACH OF POLICY CONDITION

The insuring agreement of the purchaser's policy of insurance contained the following provisions:

> "Any loss under this policy is to be established in the manner provided in said conditions and shall be paid upon compliance by the Insured with and as prescribed in said conditions, and not otherwise." (R. 35)

One of the conditions contained in that policy was:

> "Upon receipt of notice of any defect, lien or incumbrance hereby insured against, the Insured shall forthwith notify the Company thereof in writing." (R. 37)

The owner's policy contained identical provisions (R. 42, 45).

The trial court found that the Parkers knew of a substantial defect in the title to Lot 2 at the time of issuance of the purchaser's policy and that the failure of the Parkers to notify the title company between Septem-

ber 4, 1951, upon which date the policy was delivered, and prior to September 11, 1951, upon which date the final net payment of $90,250.00 on the purchase price was made, was unreasonable and materially prejudicial to the title company, and constituted a breach of the above quoted policy condition (R. 140).

Appellants seek to escape this policy condition by devious and diverse routes. The first ground of attack is not entirely clear. Their quotation from the case of *Overholtzer v. Northern Counties Title Insurance Company,* 116 Cal. App. (2d) 113, 253 P. (2d) 116, seems to imply a contention either that the policy provision above mentioned is qualified by some other clause in the policy, or else that it should not be enforced according to its plain terms. They have not, however, directed attention to any other policy provision and the *Overholtzer* case gives no support to their contention.

In the *Overholtzer* case the question involved was whether the insured, upon learning of the existence of a pipeline across his property, could reasonably rely on the title insurance policy in concluding that it was not there by virtue of an easement. Contrary to the statement on page 58 of appellant's brief, the insured had not learned from a neighbor that he had an easement over the insured's property. The court was careful to point out that while the neighbor had told him about a pipeline across the property, he did not then know that the pipeline existed by reason of the grant of an easement and was reasonably induced by the title policy to believe that the pipeline was maintained under a mere license.

The language of the court quoted from the *Overholtzer* opinion on page 58 of appellant's brief related to certain technical defenses raised by the title company. It did not, as appellants imply, relate to whether the insured had breached the contract by failing to notify the title company of the claimed easement, for the finding was that the insured had not learned of the easement.

In contrast to the *Overholtzer* case, the finding of fact here was that appellants did know of the defect in the title and were not acting in good faith.

This case is analogous to that of *Title Insurance Co. of Richmond v. Industrial Bank* (Va.), 157 S.E. 710. In that case the insurance policy covered the interest of the mortgagor under a trust deed and the policy failed to except certain street assessment liens against the property. The plaintiff and insured under the policy had foreclosed the trust deed and acquired the property at foreclosure sale. In connection with his acquisition of title to the property, he received information that there were some street assessments against it. He did not know whether or not the assessments antedated the policy and promptly endeavored to ascertain the dates of the assessments and as soon as he discovered that they were in effect at the time of issuance of the policy, he advised the title company of that fact.

The trial court instructed the jury that the plaintiff had a duty when he learned of the assessments to investigate with reasonable care to ascertain the dates and if found to be prior to the issuance of the policy, that he had a duty to at once advise the Company; and that if

the plaintiff had failed to do so, the Company was not liable. It was held that the question of whether or not there had been a breach of the notice provision of the policy was properly submitted to the jury as a question of fact.

The enforceability of the policy provision in this case is not open to question in Oregon. Under the law of this state the parties to an insurance contract have the right to impose any conditions to liability which they desire, even though the conditions may be harsh or onerous. In the case of *Barmeier v. Oregon Physicians' Service,* 194 Or. 659, 671, 243 P. (2d) 1053, the Oregon Supreme Court said:

> "Courts cannot ignore such conditions for to do so would be to make a new contract for the parties."

Consistent with this general rule, the Oregon Supreme Court holds that compliance by the insured with a policy provision requiring prompt notice of an event insured against is a *condition precedent* to liability of the insurer; and that failure of the insured to comply with such a condition will preclude recovery on the policy even where breach of the condition has not been prejudicial to the insurer. *Hoffman v. Employers Liability Assurance Corporation,* 146 Or. 66, 29 P. (2d) 557.

Apparently appellants do not contend that the law is otherwise, although their summary of the *Hoffman* case on page 60 of their brief is quite misleading. The policy there involved was a general liability policy requiring the insured to give immediate notice to the insurer upon the occurrence of an accident covered by the

policy. The insured's foreman received information that a woman had fallen over a barricade on a construction job, but was unable on subsequent inquiry to identify the woman or to ascertain whether she had suffered any injury. The insured's foreman made no report to his employer and consequently no notice was given to the insurance company, until action was filed by the injured party.

At the trial of the action on the insurance policy the insurance company called the foreman as its witness. The trial court concluded that the information which came to the foreman was so indefinite and uncertain in its nature as to constitute no notice to the assured that an accident covered by the policy had happened.

On appeal three of the Supreme Court Justices concluded that the question of whether there was sufficient evidence to excuse the delay in giving notice was one of fact and not of law; and, therefore, that the appellate court was bound by the trial court's finding on the question. The remaining two justices, while conceding that this was a question of fact, were of the opinion that the evidence was insufficient to excuse the failure to give notice of the accident. The opinion concludes that no useful purpose will be served by setting forth the testimony of the foreman and accordingly, it is impossible to weigh the merits of the opposing views thus expressed. The important point, however, is that the Supreme Court did not say that the holding of the trial court was required as a matter of law, or that a contrary holding would have been error. It is thus no authority

for a case such as this where the trial court has reached a contrary conclusion.

Although the Supreme Court in the *Hoffman* case was not in agreement as to the sufficiency of the evidence to justify the finding, it was in complete agreement as to the legal principles applicable to policy conditions such as the one here involved. Concerning the nature of the condition requiring notice the Supreme Court said:

> "Although the question has not been heretofore passed upon by this court, yet it is well settled by the decisions in other jurisdictions that conditions endorsed upon an indemnity policy, such as condition D, must be fulfilled before the assured can become entitled to recover under the policy, and that it is not necessary for the policy to contain a provision of forfeiture where, as here, the language of the contract makes the giving of notice a condition precedent to liability on the part of the insurance company."

With respect to the claim that the insurer must show prejudice, the court said:

> "It being a condition precedent to liability, it must be performed before any liability on the other side can arise as the promise to pay the indemnity is made to depend upon the performance by plaintiff of the condition. Nonperformance of the condition prevents a recovery under the policy for the reason that until the condition has been performed plaintiff, has failed to perform his contract."

The court then quoted with approval the following language from another case:

> "But in our opinion it is wholly immaterial whether or not the appellee company was prejudiced by the

unreasonable delay. If it could have been shown that it had been benefited this fact would not affect the question. A reasonable compliance with the conditions of the contract relating to notice is indispensable to fix liability."

Concerning the duty of the insured to give notice the court said:

"The word 'immediate' in its reference to the notice it not to be taken literally but means with reasonable celerity, with reasonable and proper diligence, after a discovery of a ground of liability or after such a discovery should have been made. What is a reasonable time depends upon the circumstances of each particular case and, ordinarily, the question whether required notice has been given within a reasonable time is a question of fact for the jury, having due regard to the nature and circumstances of the case."

With further reference to the burden resting on the assured the court said:

"Since, under this policy, the plaintiff had obligated himself to report immediately all accidents covered by the policy and had failed to make such report for more than one year after the happening of the accident, the burden of proving a reasonable excuse for such failure rested upon the plaintiff and not on the defendant. Upon receiving notice of the happening of an accident under a policy such as that involved here, the duty of investigating and determining whether an accident covered by the policy had happened was an active and not a passive duty upon the part of the plaintiff. He was chargeable with all the information he possessed and with all the information that he could have acquired by the exercise of reasonable diligence upon his part. Upon these and all other principles stated above, the court is in entire accord."

The applicability of the *Hoffman* case with the one at bar is readily apparent. The trial court found that the Parkers had notice of a substantial defect insured against under the policy and that their delay in reporting it to the title company was unreasonable. On this ground alone, therefore, the Parkers would be precluded from recovering on their counterclaim. The Oregon Supreme Court has similarly held in *Bennett v. Metropolitan Life Insurance Company,* 173 Or. 386, 145 P. (2d) 815, that the requirement of notice of accident or disability under life and accident and health policies is a condition precedent.

Although it was unnecessary to the decision, the trial court found that the failure to give notice was unreasonable and prejudicial and its finding in this regard was abundantly supported by the evidence. An additional $90,250 was paid after the issuance of the purchaser's policy, thereby increasing the possible loss thereunder. In addition, any subrogation rights which might be invoked by the title company were prejudiced by the possibility of merger by deed under the doctrine of the Oregon case, *City of Bend v. Title and Trust Company,* 134 Or. 119, 289 P. 1044, and by depriving it of the right to rescind the original option contract under the rule announced in such cases as *Booth Kelly Lumber Company v. Oregon R. R. Company,* 117 Or. 438, 243 P. 773; *Collins v. Delaschmutt,* 6 Or. 51, and the case of *Hall v. McKee* (Ky.), 145 S.W. 1129.

There can be no doubt that this was a contract to convey land which could have been rescinded when it

became known that the Winans family could not convey title to the property. Notwithstanding appellants' reference to the option as a "cleverly worded document" and as containing a "clumsily disguised limitation of liability" (App. Br. pp. 14, 23), it was in fact an agreement to convey realty. The clause that conveyance should be by deed conveying the right, title and interest of the seller was merely descriptive of the form of deed and in no way detracted from the promise to sell the property itself. *Collins v. DeLashmutt,* 6 Or. 51; *Sheehan v. McKinstry,* 105 Or. 473, 210 P. 167; *Thorp v. Rutherford,* 150 Or. 157, 43 P. (2d) 907; *Henderson v. Beatty* (Iowa), 99 N.W. 716; *Maffet v. Oregon California Railroad Co.,* 46 Or. 443, 80 P. 489.

Appellants, however, do not attack the findings that their conceded failure to give notice was unreasonable and materially prejudicial to appellee. Instead, they contend, first, that the policy condition applies only to notice received *after* issuance of the policy, and accordingly, that they had no obligation to disclose information which they already had concerning the flaw in the title.

The mere statement of this argument shows its absurdity. Whatever may have been their duty in the absence of contract, here was an express requirement in the purchaser's policy that the insured communicate to the insurer any information which he might receive concerning a defect in title. The purpose of the requirement was obviously to afford an opportunity for prompt investigation of adverse claims, to the end that the loss be

minimized or avoided if possible. Strict compliance with the condition was particularly important under the purchaser's policy, where every payment might aggrevate the loss. To draw a distinction between information received before and after issuance of the policy would be to ignore the obvious purpose of the provision and to give an absurd meaning to the language used.

This argument involves still another absurdity. Where recovery is allowed under title insurance policies, the damage is measured by the diminution in market value of the property *on the date when the insured learns of the defect in title. Overholtzer v. Northern Counties Title Insurance Company,* supra, and cases cited therein.

For this reason we think it obvious that even if appellants had been exonerated of fraud and had been held to be under no duty to reveal their prior knowledge of the defect in title, nevertheless liability could never exceed the damage which had accrued on September 4 when the purchaser's policy was issued. But aside from this, if appellant's present suggestion is adopted and knowledge existing at the time of issuance of a policy be discarded as unimportant, then as of what date will the damages be measured? Will appellants claim that an insured may defer his claim of loss indefinitely and thereby arrange for subsequent "discovery" of the defect at a time when market conditions will net the maximum recovery?

Other absurdities could be mentioned but the contention need not be decided here for the reason that

there is an abundance of evidence of notice of the defect brought to the attention of the Parkers again and again after August 30, 1951, the effective date of the purchaser's policy. Appellant Chet Parker was advised in detail of the defect on August 31 (R. 293, 830, 833; F. 22; R. 129). Stegmann, as agent for his undisclosed principals, the Parkers, was advised in detail of the defect on September 8 in the presence of Vawter Parker, a respected member of the Oregon Bar, at which time Stegmann was requested to sign an acknowledgement that the title was subject to the Government's claim (R. 966, 980, 981, 2265; Ex. 311). On this occasion Stegmann refused to sign the acknowledgement on the ground that it wouuld amount to acknowledging that the title was no good (R. 841, 914, 1716, 1717). Even at the time of closing the deal attorney Kenneth Abraham, acting as attorney for his undisclosed principals, the Parkers, was notified of the title question. There was thus ample evidence of information received by appellants after the purchaser's policy became effective.

The next argument made by appellants is that they had only "vague and uncorroborated information" from "unauthorized sources" which did not rise to the dignity of "receipt of notice." The adjectives used by appellants are a most inaccurate description of the evidence which the trial court found to be true, namely: The Parkers knew that the United States claimed title to Lot 2; they knew that the basis of the claim was that there had not been an official Government survey prior to the deed from the State of Oregon; they knew that the property

had been withdrawn from the public lands and included in the Bull Run Water Shed of the Mt. Hood National Forest; they knew that another title insurance company had paid $3,000 on account of the identical defect in title; they knew that an Act of Congress would be required to obtain title; they were advised by the grantor to leave the record title in the name of the Winans family until such private bill could be enacted; they were shown the plats of the United States Forest Service and advised that the title to the property was in question; they saw the signs on the property indicating that it was a part of the Mt. Hood National Forest; they even acknowledge some knowledge of the defect by suggesting to the forest rangers that the way to test the Government's claim would be to cut down a tree (R. 1050).

In addition to all of the foregoing evidence, which the trial court believed, the trial court was confronted by the fact that appellants had denied receiving such information and, therefore, necessarily had wilfully and knowingly given false testimony. The trial court was certainly entitled to take this factor into consideration in weighing the character and extent of the knowledge which appellants had concerning the title defect. We find it difficult to understand how counsel can characterize this information as vague, uncorroborated or from unauthorized sources. The trial court was certainly competent to analyze the nature of the information which appellants had and to make a finding of fact as to the reasonableness and good faith of their conduct in the light of such notice.

Appellants cite in support of this contention the *Hoffman* case, supra, which we have already discussed in some detail. As pointed out above, the *Hoffman* case in no way supports appellants' claim that the information here was insufficient as a matter of law to constitute notice of a title defect.

It is next contended that the breach of the condition of the purchaser's policy is irrelevant because the counterclaim is based on the owner's policy issued on September 14, and appellants repeat their argument that there was no duty on the part of the Parkers to pass on to appellee information that they may have obtained prior to the issuance of that policy.

It was stipulated in this case that Parker paid $25.00 for a title report on August 15 or 16 and later a balance of $405.00 as a premium for the purchaser's policy. On September 12, 1951, at the Parkers' request, and in accordance with their previous agreement (R. 176), appellee exchanged this for an owner's policy for no additional charge (R. 103-105). The owner's policy was issued after appellee had discovered the title defect in Lot 2 and in reliance upon the Parkers' good faith and their representation that they knew nothing of any claim of ownership by the United States (R. 139).

As testified to by one of the witnesses, this was all one transaction (R. 176). The complete contract between the parties as of September 4 included the following commitments:

1. Parkers would pay a premium of $430.00.

2. Title and Trust would issue a purchaser's policy in the amount of $125,000.00.

3. Upon fiinal payment of the purchase price this would be exchanged for an owner's policy without additional charge.

4. During the interim Parkers would forthwith notify the company of any defect insured against which came to their notice (R. 37).

We quote the following from 44 C.J.S., Sec. 299, p. 1200:

> "Contracts, although separate in form, agreed on as a part of the insurance transaction must be construed together for the purpose of determining the character of the insurance contract and the intention of the parties, even though they are not executed on the same day."

Any other construction here would render the owner's policy void for lack of consideration. Moreover, even if the two policies were construed as separate and distinct contracts, appellants' position would not be improved. For whatever the duty in the absence of contract, the purchaser's policy imposed a contractual duty on Parkers to disclose the defect and their failure to so do was a breach of that contract.

BRIEF OF APPELLEE TITLE AND TRUST COMPANY IN ANSWER TO APPELLANT WALTER STEGMANN

ARGUMENT

As alternatives to its causes of suit alleged against the appellants Parker the title company alleged two alternative causes of action against appellant Stegmann and one cause of action against appellant Stegmann for declaratory relief. The first alternative cause of action was based upon a theory of mutual mistake on the part of both Parker and Stegmann, thereby giving rise to a cause of action in the title company as subrogee to secure a proportionate abatement of the consideration paid Stegmann by Parker for the assignment of option (R. 16-18). Authority for such an action is found in the Oregon cases *Bartholomew v. Bason*, 188 Or. 550, 214 P. (2d) 352, and *Van Horn Construction Corp. v. Joy,* 186 Or. 473, 207 P. (2d) 157.

The second alternative cause of action stated against appellant Stegmann was based upon a theory of fraudulent concealment in the event that it were found that the Winans family had made a complete disclosure to Stegmann but that he had not made a disclosure to Parker (R. 18, 19). Authority for such an action is found in *Billups v. Colmer,* 118 Or. 192, 244 P. 1093, and 23 Am. Jur., Fraud and Deceit, Section 85.

Appellant Stegmann apparently concedes that each of these two counts state the requisites of a cause of

action excepting only the question of the right of the title company to sue as subrogee prior to payment or tender of payment to appellants Parker.

The title company's cause of action against Stegmann for declaratory relief sets forth that the Parkers had demanded indemnity for their loss or damage in the total sum of $125,000, that the title company claimed a right to indemnity in whole or in part from Stegmann on account of any loss or damage for which it might be held liable to the Parkers and then sets forth a number of common disputed questions of fact and law in the controversy between the title company and Stegmann and Parkers, among the most important of which were the legal effect of the grant of the option and its exercise, whether Stegmann was acting on his own behalf or as agent for an undisclosed principal, whether there was any consideration paid by Parker to Stegmann for the assignment of option, whether Winans disclosed to Stegmann the facts relative to the defect in title and whether Stegmann disclosed to Parker the matters relative to said defect (R. 19-22).

It is at once apparent that if the controversy between the Parkers and the title company proceeded to trial and final decision alone in the absence of Stegmann as a party to the proceeding the interests of Stegmann with respect to any of the questions stated in the preceding paragraph would be affected by virtue of the application of the doctrine of *stare decisis* even though the determination in such event would not be *res judicata* as to him. Depending upon the determination the result

might be either harmful or helpful to Stegmann's interests in any litigation between himself and the title company or Winans or the Parkers pertaining to his part in the transaction. Thus, Stegmann at the least was a proper party to the litigation if perhaps not an indispensable party.

That an insurer does not have to pay a claim in order to have a declaration as to its right of subrogation against another insurer and that a declaration is proper although liability of either insurer depended upon a contingency which had not yet happened was held in the case *Maryland Casualty Co. v. Hubbard,* 22 Fed. Sup. 697 (DC, SD, Cal.). The court further held that it is proper to join parties in a declaratory judgment proceeding whose interest might under certain contingencies be adverse to that of the plaintiff in the proceeding or whose present obligation to the plaintiff is merely potential and the court pointed out that community of interest in a question of fact or law is the test of joinder of proper parties in a declaratory judgment action. See also the case, *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 85 L. Ed. 826, where a similar conclusion was reached.

In *Franklin Life Insurance Co. v. Johnson,* 157 Fed. (2d) 653 (CCA 10), at page 658 of the report the court stated:

> "To hold a person whose interest is contingent may not be compelled to defend an action for a declaratory judgment would greatly diminish the field and lessen the utility of declaratory judgment actions. The purpose of the declaratory judgment action is to settle actual controversies before they

> have ripened into actual violations of law or legal duty or breach of contractual obligations."

The court went on to hold that a contingent beneficiary under a life insurance policy is at the least a proper party to a declaratory judgment action and the court stressed the importance of one determination of common questions of law and fact as to the legal relationships and rights under a policy of insurance.

The cases relied on by appellant Stegmann are not persuasive in the case at bar because:

Heller v. Shapiro, 208 Wis. 310, 242 N.W. 174, 87 A.L.R. 1201, involved an attempt to enjoin sale of property acquired by defendant under a mortgage foreclosure decree based upon an event which might occur in future.

State Mutual Life Assur. Co. v. Webster (C.A. 9), 148 F. (2d) 315, involved rendering an advisory opinion as to rights which had neither been asserted or denied by the interested parties.

Johnson v. Interstate Transit Lines, 163 F. (2d) 125, involved no actual controversy between the actual parties and a defect in parties who might have a justiciable controversy with plaintiff.

While it is true that the record of the case at bar is complicated and the trial was lengthy, nevertheless it is clear that the purpose of the declaratory judgment procedure has been fulfilled in that all matters arising out of subject transaction have been disposed of in one lawsuit without exposing any of the parties to the hazard of having some important issue determined in one man-

ner in one case and in exactly the opposite manner in another, and by making it possible to bring before the court all material and relevant evidence bearing on the issues.

Regardless of the theories set forth in the pleadings, in the light of the trial court's findings that Stegmann was one of the conspirators to defraud the title company, it is absurd for him at this time to suggest that he was not a proper party defendant.

CONCLUSION

For the reasons stated the judgment of the trial court should be affirmed.

Respectfully submitted,

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No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,
Appellants,

vs.

TITLE AND TRUST COMPANY, a Corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees,

and

WALTER STEGMANN,
Appellant,

vs.

TITLE AND TRUST COMPANY, a Corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees.

On Appeals from the United States District Court for the District of Oregon.

BRIEF OF APPELLEES PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS

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Treatises

No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,
Appellants,

vs.

TITLE AND TRUST COMPANY, a Corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees,

and

WALTER STEGMANN,
Appellant,

vs.

TITLE AND TRUST COMPANY, a Corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees.

On Appeals from the United States District Court for the District of Oregon.

BRIEF OF APPELLEES PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS

INTRODUCTION

These appeals, insofar as appellees Paul, Ross, Audubon, Linnaeous and Ethel Winans (four brothers and a sister, residing near Hood River, Oregon, hereafter some-

times collectively referred to as "the Winans" or "the appellees Winans") are concerned, arise from a judgment for $9,000 awarded them upon their cross-claim against appellants for damages suffered as a result of appellants' tortious and malicious conduct and false and defamatory representations.

The briefs of the appellants present an incomplete and misleading picture of the nature of the cross-claim of the appellees Winans and of the Findings of the District Court. We are therefore compelled to set forth a more complete statement of the case in order that the claim of the appellees Winans may be viewed in its proper perspective[1].

STATEMENT OF THE CASE, PRESENTING QUESTIONS INVOLVED

A. Proceedings Below

These appeals stem from the following involved proceedings below:

(1) Plaintiff-appellee Title and Trust Company by an amended complaint against defendant-appellants Chet Parker, Lois Parker and Walter Stegmann brought suit to cancel certain policies of title insurance issued by it and to obtain other declaratory relief (Tr. 3-50).

(2) Defendant - appellant Chet Parker counterclaimed against the Title and Trust Company for breach

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[1]References to the record are identified as "Tr."; to Findings of the District Court as "F."; to the brief of appellants Parker as "P. Br."; and to the brief of appellant Stegmann as "S. Br.".

of his policies of title insurance, seeking damages of $125,000 together with attorneys fees of $12,500 (Tr. 56-60).

(3) The Title and Trust Company thereupon filed a third party action against third-party defendants-appellees Winans, seeking recovery over against them of any judgment which Chet Parker might obtain against it in his counterclaim and for various other declaratory relief (Tr. 61-71).

(4) Third-party defendants-appellees Winans in turn filed a cross-claim against Chet Parker, Lois Parker and Stegmann to recover $70,000 damages, $20,000 special damages and $100,000 punitive damages (Tr. 83-92)[2].

(5) The defendant-appellant Chet Parker in turn filed a cross-claim against the Winans, seeking recovery over against them for $125,000 in the event his title insurance policies were cancelled (Tr. 94-95). The defendant-appellant Stegmann also filed a cross-claim against the Winans seeking to recover over any judgment against him in favor of Title and Trust Company and to recover attorneys fees.

B. The Winans' Cross-Claim

In their cross-claim against the appellants, the Winans alleged that they had sustained general and special damages and were entitled to punitive damages, as a re-

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[2]Third-party defendants-appellees Winans also filed a counterclaim against the Title and Trust Company (Tr. 81-83) but abandoned it at the conclusion of the trial (F. XLIV, Tr. 141).

sult of a conspiracy on the part of the appellants to defraud the Title and Trust Company and to injure them in their businesses and reputation and to defame them (Tr. 85-86)[3].

In substance, the Winans alleged they had sold certain property (designated herein as Lot 2) purportedly to appellant Stegmann, making a full disclosure to him as well as to appellant Parker (though not knowing the latter to be the real purchaser), of the defect in their title to Lot 2 by reason of the claim of ownership of the United States and of a previous settlement received by them upon a prior policy of title insurance on Lot 2 by reason of this defect; but that the appellants had nonetheless engaged in a conspiracy to defraud the Title and Trust Company by securing title insurance from them on Lot 2 with knowledge that the Title Company had not discovered the defect in title. The cross-claim alleged in detail the various acts in which the appellants had engaged and the ruses which they had adopted in order to perpetrate their scheme (Tr. 86-88).

The Winans further alleged that when a claim of loss was later made upon the policies of title insurance which had been issued by the Title and Trust Company, the Parkers, in furtherance of their conspiracy with Stegmann, maliciously and with intention to injure the Winans, represented that the Winans had never told

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[3]Appellants Parker in their brief have questioned the source of the charge found "to be true" by the District Court that the appellants were engaged in a "conspiracy", stating that this was not charged in the original or amended complaint (P. Br. 37-38). The source, as noted above, was the cross-claim of the Winans.

them anything concerning the claim of ownership of the United States to Lot 2 and, in fact, had represented themselves as being the owners of Lot 2 with a marketable title thereto (Tr. 88-89). The cross-claim further alleged that appellants' malicious, false and defamatory representations were made with the knowledge that as a result of them the Title and Trust Company would file an action against the Winans and would publish such charges; and that, in fact, the present action was filed against the Winans by the Title and Trust Company charging that the Winans had falsely represented themselves as the owners of a marketable title to Lot 2 and had failed to disclose their knowledge of the defect in the title to Lot 2, which charges were published and given wide circulation (Tr. 89-90).

As a result of the conspiracy and of the malicious, false and defamatory statements and representations, the cross-complaint alleged that the Winans had been generally damaged in their businesses and reputation and had been specially damaged by being forced to retain and pay for the services of attorneys to defend themselves against the present action brought against them as a result of the wrongful acts of the appellants (Tr. 90). The Winans also prayed for exemplary and punitive damages by reason of the malicious and intentional acts of the appellants (Tr. 91).

C. The Trial: Conflict in Testimony

The trial of the case before the District Court (a jury having been waived) took 13 days, during which time 45 persons testified, over 125 exhibits were intro-

duced in evidence, and there was heard, we believe, some of the most bizarre and conflicting testimony ever presented in a courtroom.

Seemingly—and as the appellants testified—there was nothing to the case. Stegmann obtained an option from the Winans for the purchase of both Lots 1 and 2 for $100,000. He assigned this option to Chet Parker for $25,000, who thereafter took over dealing directly with the Winans as the purchaser, ultimately paying them $95,250 for the property. Chet Parker also obtained a policy of title insurance for $125,000 on the property. The United States then claimed ownership of Lot 2, of which claim Stegmann and Parker had never been advised by the Winans nor had any previous knowledge. Since Title and Trust Company admitted there was a defect in the title to Lot 2 by reason of the claim of the United States, Parker was entitled (Lot 2 being worth more than $125,000) to the full face value of his title policy.

The biggest trouble with appellants' story, to begin with, was that the Winans did not agree with it. Their testimony was that they had fully disclosed to Stegmann the nature and basis of the claim of the United States to ownership of Lot 2 (Tr. 797-798, 801-802, 839-841, 846-847, 850, 913, 914, 946-947, 1603, 1615-1617, 1626-1631, 1716-1718; Exhibit 311, Tr. 2265-2266) and that the only person they had ever dealt with in the sale of the property was Stegmann who had represented he wanted it as a primitive retreat (Tr. 790, 825, 836, 843, 897-898, 916, 923, 1009, 1606, 1612, 1619-1620).

The Winans testified, however, that they had met Chet Parker as a surveyor friend of Stegmann and in fact had disclosed to him also the nature and basis of the defect in their title to Lot 2 (Tr. 823-825, 831-836, 907-908, 1618-1620, 1641, 1708-1709).

Moreover, not only the Winans but also disinterested third persons and the documentary evidence disagreed with appellants' version. From two reputable attorneys, a United States civil engineer, and a real estate broker came confirmation of the disclosure by the Winans of the defect in the title to Lot 2 (Tr. 773, 776-781, 783, 943-944, 946-947, 965, 968-970, 980-982, 989, 1002-1004, 1008-1009, 1026-1028, 1034-1036). From two United States Forest Service employees came unequivocal testimony that Chet Parker and Stegmann had been put on notice of the defect in title to Lot 2 on the same day that Parker had ordered a title report from the Title and Trust Company (Tr. 1049-1057, 1061-1062, 1066-1070; Exhibits 71 and 72, Tr. 2182, 2183).

The testimony of the Winans that they had never heard of, or dealt with, Parker as the purchaser of the property was confirmed by the attorney who handled the sale for them and by the civil engineer who was present during surveys of the property and in drawing up the description to be inserted in the deed (Tr. 972-973, 987, 1006, 1028-1029, 1041, 1044-1045). Appellants' testimony that Parker had taken over the purchase by being personally present at a certain meeting on August 18 at the Winans was disputed by the two civil engineers (Tr. 1029-1030, 1041-1045, 1663-1667, 1669-1671);

and even more important, in confirmation of the Winans' testimony that only Stegmann had been present at the August 18th meeting and had personally executed a so-called "Notice of Election to Purchase", there was introduced in evidence the document itself—a key exhibit in the case (Exhibit 307, Tr. 2264-2265)—admittedly bearing Stegmann's signature, after both Chet Parker and Stegmann had sworn that Stegmann had never executed any such document because on August 18th appellants said Parker was known to be the purchaser and there would have been no occasion for Stegmann to execute this document (Tr. 280-282, 1991-1997).

Along with such testimony contradicting appellants' testimony as to their relations with the Winans, there was introduced considerable other evidence as to past dealings between the Parkers and Stegmann and between these three appellants and third persons, which contradicted the appellants' testimony that Stegmann had never acted as an agent for the Parkers and had never been engaged in any ventures with them.

As finally submitted to the District Court, this case presented a plethora of conflicting testimony, requiring the Court in an unusual degree to pass upon the credibility of the witnesses. Truly this case, as this Court said in *Wittmayer v. United States,* 118 F. (2d) 808, 811 (1941) quoting from Mr. Justice Holmes in *Adamson v. Gilliland,* 242 U.S. 350, 353, is:

> ". . . pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon con-

flicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

D. The Findings of Fact

Based upon the entire record before it, the District Court resolved the conflict in testimony against the appellants, opining that their testimony "was not corroborated on any material issue by any credible independent evidence" and "was false in many particulars and, when not actually controverted, was highly improbable and, at times, fantastic" (Tr. 107).

Insofar as the Winans' cross-claim is concerned, the District Court made numerous pertinent Findings of Fact:

(1) Stegmann negotiated with the Winans initially for the purchase of Lot 1 and later for the purchase of Lot 2 as a private mountain retreat for himself and his family, the Winans at first offering to sell Lot 1 for $80,000 and their interest in Lot 2 for $20,000, with Stegmann finally taking an option to buy both lots for $100,000 (F. XV, Tr. 125; F. XVI, Tr. 125-127).

(2) The Winans in their negotiations with Stegmann made a full disclosure of (a) the claim of ownership of the United States to Lot 2, advising him that the United States asserted that title thereto had never passed from the United States to the State of Oregon because it had never been surveyed; and (b) a policy of title insurance which had previously been obtained on Lot 2 and for which a cash settlement had been received

on account of the unmarketability of the title by reason of the claim of ownership asserted by the United States (F. XV, Tr. 125).

(3) Stegmann subsequently introduced Chet Parker to the Winans as a friend who had some surveying experience; and the Winans, prior to the transfer of their interest in the property, also made a disclosure to Chet Parker of the nature and basis of the claim of ownership of the United States to Lot 2 and of the settlement of the policy of title insurance previously issued on Lot 2 by reason of the claim of the United States (F. XXII, Tr. 129).

(4) While the deed for the transfer of the property was being drafted, the Winans again discussed with Stegmann the claim of ownership of the United States to Lot 2 and again offered to assist him in clearing the title thereto through Congressional action. At the closing of the transaction the Winans also advised an attorney (who they thought was acting for Stegmann but who unbeknown to them was employed by the Parkers to close the transaction for them) of the claim of ownership of the United States to Lot 2 and offered to assist in attempting to clear said title by said act of Congress (F. XXV, Tr. 130-131; F. XXVI, Tr. 131-132).

(5) In all negotiations and transactions between the Winans and Stegmann, the latter represented that he was acting on his own behalf and concealed from them the true fact he was acting for the Parkers. The Winans never learned that the Parkers had any interest in the transaction until after the recording of the deed (F. XV, Tr. 125; F. XXXVIII, Tr. 133-134).

(6) The Winans never represented to the Parkers or to Stegmann that they had a marketable title to Lot 2, nor did they ever represent that the claim of ownership of the United States to Lot 2 was inconsequential, minor and without basis in fact (F. XXXIV, Tr. 135-136).

(7) In making a claim of loss on their policy and negotiating thereon with the Title and Trust Company, the Parkers represented that the Winans had not disclosed any defect in the title to Lot 2 or disclosed their knowledge of the claim of ownership of the United States to Lot 2 and intentionally induced the Title and Trust Company to believe that the Winans represented themselves to be the owners of Lot 2 with a good title thereto (F. XLIII, Tr. 140).

(8) Such false representations slandered the Winans by imputing to them the commission of a crime within the meaning of Section 23-550 O.C.L.A. (F. XLV, Tr. 141-142).

(9) Such false representations and conduct of the Parkers were made with the knowledge that the probable consequences thereof would be to injure the Winans and that the Title and Trust Company would institute legal proceedings against the Winans (F. XLIII, Tr. 140-141; F. XLVI, Tr. 142).

(10) The false representations and conduct of the Parkers concerning the Winans were largely responsible for the inclusion of the Winans as defendants in the original action filed by the Title and Trust Company, in which it was alleged that the Winans falsely repre-

sented they were the owners to a marketable title to Lot 2, that none of the Winans had disclosed to the Parkers or Stegmann the claim of ownership of the United States to Lot 2 or the settlement of the policy of title insurance previously issued on Lot 2 by reason of the claim of the United States. These charges were published in the Hood River paper and given wide circulation in Hood River, Oregon, and the surrounding area where the Winans reside (F. XLVI, Tr. 142; F. XLVII, Tr. 142-143).

(11) The Winans were damaged as a result of the action filed against them and the accompanying publicity in that they were required to employ and pay for attorneys to defend them and in that two of the Winans found it more difficult for them to obtain credit in connection with their businesses (F. XLVII, Tr. 142-143).

(12) The Winans sustained damages of $9,000 (F. XLVIII, Tr. 143).

(13) In connection with the purchase of the property from the Winans, the Parkers and Stegmann engaged in a conspiracy to defraud the Title and Trust Company; and the false representations by the Parkers to the Title and Trust Company were made in furtherance of the conspiracy between themselves and Stegmann (F. XXXV, Tr. 136; F. XLVI, Tr. 142).

Accordingly, upon their cross-claim, the Winans were awarded a judgment for $9,000 damages and their costs and the respective cross-complaints of the appellants against the Winans were dismissed with prejudice (Tr. 146-150).

E. Questions Presented

In appealing from this judgment in favor of the Winans, the appellants have by their specifications of error and in their briefs asserted that the District Court erred (1) legally, in awarding the Winans any damages at all; (2) factually, in making certain Findings; and (3) in dismissing the respective cross-complaints of the appellants against the Winans (though this point is not argued in appellants' briefs).

Accordingly, insofar as the appellees Winans are concerned, the ultimate questions involved in this appeal are (1) whether, assuming the correctness of the Findings of the District Court, the judgment awarding the Winans $9,000 damages is erroneous as a matter of law; (2) whether certain Findings of Fact of the District Court are "clearly erroneous", due regard being given "to the opportunity of the trial court to judge the credibility of witnesses" (Rule 52 (a), Federal Rules of Civil Procedure); and (3) whether the District Court erred in dismissing the respective cross-claims of the appellants against the Winans.

We believe the first two questions are sufficiently intertwined, so that in the interests of brevity they may be discussed together.

ARGUMENT

I.

The District Court did not Err in Awarding the Appellees Winans Damages for the Harm They Sustained as a Result of the Appellants' Wrongful and Malicious Acts and Representations.

A. Nature of Winans' Cross-Claim

In their cross-claim, as can be readily seen from the summary set forth above, the appellees Winans alleged a series of wrongful acts on the part of the appellants, pursuant to a conspiracy, which resulted in harm to their reputation and businesses and caused them to incur litigation expenses.

The Winans' cross-claim is not an action for slander—as appellants have erroneously sought to limit it and characterize it (P. Br. 2, 69)—but is an action on the case.

The remedy of action on the case, the Oregon Supreme Court has recently stated, "is still preserved, and . . . is employed by the courts in cases whose facts do not fall into the pattern of any other well-defined cause of action" (*Kuhnhausen v. Stadelman,* 174 Or. 290, 299, 148 P. (2d) 239, 242 (1944)).

In *Cash v. Garrison,* 81 Or. 135, 158 P. 521 (1916), the Oregon Court had previously sustained, as an action on the case, a complaint setting forth a long series of wrongful acts contributing to injuries sustained by the plaintiff, saying:

> " 'A series of wrongful acts, all aimed at a single result and contributing to the injury complained of, to wit, the destruction of one's business, credit and reputation, may be counted upon collectively, as producing that result, in an action on the case': Oliver v. Perkins, 92 Mich. 304 (52 N.W. 734)." (81 Or. at 139, 158 P. at 522)[4]

The Federal Rules of Civil Procedure having substituted the word "claim" for the traditional and hydra-headed "cause of action", there has been set forth in the Winans' cross-claim the aggregate of the various operative facts giving rise to their rights enforceable in the courts. *Original Ballet Russe v. Ballet Theatre,* 133 F. (2d) 187, 189 (2nd Cir. 1943).

B. Appellants' Wrongful Acts

1. Conspiracy to Defraud

The appellees Winans charged in their cross-complaint that the appellants had engaged in a conspiracy to defraud the appellee Title and Trust Company (Tr. 85-86), and the District Court found that in fact the appellants had engaged in such a conspiracy by securing a policy of title insurance on property which they knew had a title defect and in an amount greater than the actual value thereof (F. XXXV, Tr. 136).

The relation and significance of appellants' scheme to defraud the Title and Trust Company to the Winans' cross-claim for damages is that the Winans were caught

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[4]See also Kaller v. Spady, 144 Or. 206, 214-215, 24 P. (2d) 351, 354 (1932); Williamson v. Columbia Gas & Electric Corp., 110 F. (2d) 15, 18 (3rd Cir. 1940); 52 Am. Jur., Trespass on the Case, Secs. 2, 4, 8, 9, 10, and 11, pp. 900-904.

as innocent (but necessary) victims in the web of appellants' scheme and were injured thereby.

By the rather adroit maneuver of dividing their briefs in two separate parts—one part dealing with the appellee Title and Trust Company, and the other part dealing with the appellees Winans—appellants must not be allowed to divert this Court's attention from a point that cannot be too strongly emphasized, namely, that the appellees Winans were injured as a direct consequence of, and as a part of, the over-all tortious conduct of the appellants in conspiring to and almost succeeding in defrauding the Title Company.

In terms of the ultimate success of the appellants' scheme, insofar as the appellees Winans were concerned, it can now be seen that it was essential that the Winans have no knowledge that the Parkers were the real purchasers and were obtaining title insurance on Lot 2 with its defective title. Thus it was that Stegmann was used by the Parkers as their "front man" to insulate them from the transaction[5]. Appellants' purpose, in part, was to place themselves in such a position that if it was necessary for the Parkers to ever assert a claim against the Title Company they could say they had no previous knowledge of any defect and that the property had been represented to their assignor as having a marketable title; and this is exactly what the Parkers actually later did assert.

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[5]Appellants' scheme in this respect almost gave way when during the drafting of the deed, the Winans' attorney suggested consulting the Title and Trust Company, but was prevented from so doing by Stegmann's vigorous objections (Tr. 978-979; F. XXV, Tr. 131).

While the harm suffered by the Winans flowed more directly from the forces set in motion by the Parkers in connection with their making their claim for loss to the Title and Trust Company, we ask this Court to bear in mind that the false representations and actions of the Parkers at this later time were only the last strands in the web of their conspiracy to defraud the Title Company and were found to be so by the District Court (F. XLVI, Tr. 142).

Oregon law is clear that tort feasors are liable to the persons injured for all the natural and direct consequences of their wrongful acts. *Gilman v. Burlingham,* 188 Or. 418, 423, 216 P. (2d) 252, 255 (1950). The damages inflicted on the Winans by the appellants were such reasonably foreseeable consequences of their scheme to defraud the Title Company.

In the interests of brevity, we shall leave to the brief of the appellee Title and Trust Company the marshaling of the evidence supporting the Findings of the District Court as to the fraudulent scheme of the appellants to defraud the Title Company.

2. Injurious Falsehoods and Intentional Infliction of Damages

The appellees Winans charged (Tr. 88-90) and the District Court found that as part of the conspiracy to defraud the Title and Trust Company:

First, that the Parkers represented to the Title Company that the Winans had not disclosed any defect in the title to Lot 2 or their knowledge of the claim of ownership by the United States;

Secondly, that these representations were false;

Thirdly, that these false representations were made with the knowledge that the Winans would be injured thereby;

Fourthly, that these false representations were largely responsible for the inclusion of the Winans as defendants in the original action instituted by the Title and Trust Company, in which it was alleged that they had falsely represented they were the owners of a marketable title to Lot 2 and had not disclosed the claim of ownership of the United States to Lot 2 or the settlement of a title insurance policy previously issued thereon;

Fifthly, that as a result of said action and the attendent newspaper publicity, the Winans were required to incur litigation expenses and sustain other damages (F. XLIII, Tr. 140-141; F. XLV, Tr. 141-142; F. XLVI, Tr. 142; F. XLVII, Tr. 142-143).

(a) *Authorities*

Under the Findings of the District Court, the appellants are liable as a matter of law for the intentional harm which they inflicted on the Winans by their false representations to the Title Company.

It is an accepted principle in the law of torts that a person who intentionally makes a false statement concerning another with knowledge that the other person may suffer therefrom, is liable for the resulting harm. See Restatement of Torts, Sec. 873, Vol. IV, pp. 430-432; Harper, Law of Torts, Secs. 235 and 242, pp. 498-

499, 516; Salmond, Law of Torts (9th Ed. 1936), Secs. 150 and 151, pp. 607, 619-622; Gattley, Libel and Slander (4th Ed. 1953), pp. 140-142.

The principle has been thus phrased in the Restatement of Torts, Sec. 873:

> "A person who, with knowledge of its falsity, makes an untrue statement concerning another which he realizes will harm the other is liable to the other for such resulting harm as he should have realized might be caused by his statement." (Vol. III at p. 430)[6]

Salmond, *op. cit.*, p. 619, states it this way:

> "It may be stated as a general rule that it is an actionable wrong maliciously to make a false statement respecting any person with the result that other persons deceived thereby are induced to act in a manner which causes loss to him."

Illustrative of the principle enunciated by these authorities and particularly apposite to the case at bar is *Gale v. Ryan,* 263 App. Div. 76, 31 N.Y.S. (2d) 732 (1st Dep't. 1941), where the complaint alleged that the defendant—as part of a scheme to defraud the United States Government and the State of New York by concealing income—intentionally submitted false and fraudulent tax returns as to wages purportedly received by the plaintiff. As a result of these false and fraudulent statements, the complaint alleged that the plaintiff had

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[6]Insofar as the person making the false statement acts for the purpose of causing harm to the other, the Restatement (Sec. 873, Comment (a)) points out that it falls within the broader principle of Sec. 870: a person who does any tortious act for the purpose of harming another or his pecuniary interests is liable for the resulting harm.

been and still was subject to investigation with the threat of criminal indictment, that his name and reputation had been injuriously affected, that he had been prevented from attending to his business and had been subjected to expense in procurement of counsel.

The appellate court held that the complaint stated a good cause of action and reversed an order dismissing the complaint, saying:

> "Under the allegations of the complaint, we think that the plaintiff has stated a cause of action which has received recognition. It has been held (Ratcliff v. Evans, [1892], 2 Q.B. 524, 527): 'That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title.' " (263 App. Div. at 78, 31 N.Y.S. (2d) at 734)

Similarly, in *Al Raschid v. News Syndicate Co., Inc.*, 265 N.Y. 1, 191 N.E. 713 (1934), the complaint alleged that the defendant gave false information to immigration officials knowing his statements to be false, as a result of which the plaintiff was prosecuted and deported. The Court of Appeals in New York held that an action would lie for maliciously giving false information resulting in intentional injury to another, even though no cause of action would lie for malicious prosecution:

> "Whatever we may call it an action does lie, however, if the complaint states any facts showing a wrong which the law recognizes and will redress.

> One may not be liable for malicious prosecutions and yet be legally responsible for maliciously circulating or giving false information resulting in intentional injury to another. Even a lawful act done solely out of malice and ill will to injure another may be actionable. Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203, 27 A.L.R. 1411. 'A man has a right to give advice, but advice given for the sole purpose of injuring another's business and effective on a large scale, might create a cause of action.' American Bank & Co. v. Federal Reserve Bank, 256 U.S. 350, 358. . . . An action will lie for knowingly and intentionally and without reasonable justification or excuse inducing a breach of contract." (265 N.Y. at 3-4, 191 N.E. at 714)

That an action will lie for intentionally making false statements known to be false resulting in damage to another, has been recognized in many other cases noted below[7].

Analysis of the above cases indicates that they are a variety of the wrong of fraud or misrepresentation. The usual action for fraud and deceit involves the defendant deceiving the plaintiff so that he causes harm to himself by his own mistaken act. Instead, here we have involved the wrong of deceiving other persons so that they by their mistaken acts cause harm to the plaintiff. It is for this latter type of wrong for which the appellees Winans sought and were awarded damages by the District Court. By their representations and actions,

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[7]Ratcliff v. Evans, [1892] 2 Q.B. 524; Morasse v. Brochue, 151 Mass. 567, 574-575, 25 N.E. 74, 76-77 (1890); Reid v. Providence Journal Co., 20 R.I. 120, 125, 37 A. 637, 638 (1897); Husted v. Husted Co., 193 App. Div. 493, 184 N.Y.S. 844 (2nd Dep't. 1920); Ledwith v. International Paper Co., 64 N.Y.S. (2d) 810, aff'd. 271 App. Div. 864, 66 N.Y.S. (2d) 625 (1st Dep't. 1946).

the appellants Parker deceived the Title and Trust Company into believing that the Winans had not disclosed their knowledge concerning the defect in title to Lot 2; and the Title and Trust Company, acting upon this mistaken notion induced by the appellants Parker as part of their conspiracy with the appellant Stegmann, brought the present suit against the Winans with its attendant damages and expenses to the Winans for which they here seek recompense.

Closely related to, and perhaps indistinguishable from, the above authorities dealing with liability for intentional falsehoods, is the so-called prima facie tort doctrine[8], enunciated by Justice Holmes in *Akins v. Wisconsin,* 195 U.S. 194 at 204 (1904) that:

> ". . . prima facie, the intentional infliction of temporal damages is a cause of action, which . . . requires a justification if the defendant is to escape."[9]

or, as stated by Lord Bowen in *Mogul Steamship Co. v. McGregor, Gow & Son Co.,* 23 Q.B.D. 598, 613, aff'd. [1892] A.C. 25:

> "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's prop-

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[8]Generally, see Note, 52 Columbia Law Review 503-513 (April 1952).

[9]Many years later in American Bank & Trust Co. v. Federal Bank, 256 U.S. 350 (1921), Justice Holmes stated:

> "If without a word of falsehood but acting from what we have called disinterested malevolence a man by persuasion should organize and carry into effect a run upon a bank and ruin it, we cannot doubt that an action would lie." (256 U.S. at 358)

See also Holmes "Privilege, Malice and Intent", 8 Harvard Law Review, 1-14 (1894).

erty or trade, is actionable if done without just cause or excuse."

So, for example, in *Mangum Electric Co. v. Border,* 101 Okla. 64, 222 P. 1002 (1923), a plaintiff brought an action for damages against certain defendant owners of an electric light plant, as to which the plaintiff as mayor and the city council had called an election to vote bonds to construct a municipal light plant. The petition alleged that the defendants to defeat the bond issue had conspired together to injure the plaintiff in his business and reputation and pursuant to the conspiracy had secured a pregnant woman to endeavor to induce the plaintiff through false representations to produce an abortion upon her. The Court viewed an action for damages as lying for the doing of intentional acts intended to damage another in his property and in his profession through false and fraudulent representations and referred to other cases where such intentional actions have been designated as "malicious wrongs" (the intentional doing of a wrongful act without justification)[10].

The case at bar falls within the ambit of the prima facie tort doctrine in all of its essentials: the appellants intentionally made false representations which in the ordinary course of events were likely to harm the Winans; such harm actually resulted in pecuniary damage to the Winans; and the appellants have no excuse for their conduct, other than they were attempting to de-

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[10]See also, Keene Lumber Co. v. Leventhal, 165 F. (2d) 815 (1st Cir. 1948); Advance Music Corporation v. American Tobacco, 296 N.Y. 79, 83-84, 70 N.E. (2d) 401, 402-403 (1946).

fraud the Title Company, which is scarcely legal justification for their actions.

No Oregon cases have been found on the right of action for damages for intentional falsehoods, but there would seem to be no doubt that Oregon recognizes that the intentional infliction of temporal damages is a cause of action for which recovery may be had.

Thus, in *Johnson v. Oregon Stevedoring Co. Inc.,* 128 Or. 121, 270 P. 772 (1928), Oregon recognized the prevailing doctrine that the intentional unwarranted act of depriving a person of employment was a legal wrong for which damages might be recovered, citing with approval the following language from Webb's Pollock on Torts (p. 406):

> "One of the aims of the common law has been to protect every person against the wrongful acts of every other person, whether committed alone or in combination with others, and to this end it has provided an action for injuries done by disturbing a person in the enjoyment of any right of privilege which he has. See Walker v. Cronin, 107 Mass. 562." (128 Or. at 136, 270 P. at 776)

And in *DeMarais v. Stricker,* 152 Or. 362, 53 P. (2d) 715 (1936) involving an action for wrongful interference with plaintiff's employment, the Court said:

> "At common law, one prevented from securing employment through wrongful and malicious interference of another may recover damages, and this principle applies to interference preventing the formation of a contract as well as interference with existing contractual relations, and 'malice', as used in such case, means nothing more that the inten-

tional doing of an injurious act without justification or excuse." (152 Or. at 365-366, 53 P. (2d) at 716)

Article I, Section 10, of the Oregon Constitution provides:

". . . every man shall have remedy by due course of law for injury done him in his person, property or reputation." (ORS, Vol. V, p. 1000)

This provision of the Oregon Constitution—a constitutional re-affirmation of the ancient common law axiom "Ubi Jus Ibi Remedium"—was very recently referred to and utilized by the Oregon Supreme Court in holding in a case of first impression in Oregon that an action will lie for libelous matter contained in a will. *Kleinschmidt v. Matthieu,* 58 Or. Ad. 125, 206 P. (2d) 686 (1954). That Oregon is not adverse to expanding its common law to apply remedies for the reddess of acknowledged wrongs seems equally evident from the recent case of *Hinish v. Meier & Frank Co.,* 166 Or. 482, 113 P. (2d) 438 (1941), where it was held that an action for damages would lie for breach of the right of privacy[11].

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[11]In this case, the Oregon Supreme Court stated:

"We are called upon, as Mr. Justice Holmes says somewhere, 'to exercise the sovereign prerogative of choice' between the view that the courts for want of a precedent are impotent to grant redress for injury resulting from conduct which universal opinion in a state of civilized society would unhesitatingly condemn as indecent and outrageous, and the view that the common law, with its capacity for growth and expansion and its adaptability to the needs and requirements of changing conditions, contains within itself the resources of principle upon which relief in such a case can be founded. * * * *

"We should not be deterred by fear of being accused of judi-

As the Court of Appeals for the Seventh Circuit has pointed out, the absence of state precedent affords no justification for the denial of a common law remedy where the rights of an individual have been invaded by the wrongful acts of another, *Daily v. Parker,* 152 F. (2d) 174, 177 (1945), it being said that "If the state courts have not acted, we are free to take the course which sound judgment demands." Likewise, this Court noted in *Heine v. New York Life Ins. Co.,* 50 F. (2d) 382, 386 (1931), that "to have a precedent, there must be an antecedent case; but the lack thereof does not defeat a right or privilege."

(b) *Evidence*

Appellants would dispute the applicability of the foregoing principles, claiming that there is no evidence in support of the Findings of the District Court.

In accordance with the policy of this Court not to weigh the evidence or disturb the lower court's findings, where the testimony is conflicting and the record contains sufficient evidence to support them (*Continental Casualty Co. v. Schaefer,* 173 F. (2d) 5, 8 (1949)), appellants' challenge to the Findings is mostly clearly refuted by a brief summarization of some of the supporting evidence:

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cial legislation. Much of our law is judge-made, and there are those who think that it is the best law . . . The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues." (166 Or. at 503-504, 113 P. (2d) at 446-447).

The representations[12]—Attorney Buell, who represented the Title and Trust Company during the negotiations with the appellants Parker in connection with their claim of loss, testified as follows with respect to Chet Parker's representations:

> "Q. What, if anything, did Mr. Parker say regarding any—well, first of all, his knowledge of any defect in the title to the forty acres?
>
> A. Well, he told us that he did not know anything about any defect in the title until after the deed had been received and recorded." (Tr. 1771)

Attorney Buell also testified:

> ". . . so I particularly questioned him [Chet Parker] about just exactly what Mr. Winans had had to say about the property on the occasion that they were up on the lake. It was in the course of that questioning that he stated that he did not have an opportunity to talk very much with Mr. Winans and that there was no discussion between them as to the title on that one occasion that he had met him." (Tr. 1773)

Later, the District Court itself took up the questioning of Attorney Buell:

> "The Court: In other words, through these negotiations you assumed that the Parkers had no knowledge of the defects?
>
> The Witness: That is right.

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[12]F. XLIII "Following discovery of the defect in title to Lot 2 by the plaintiff [Title and Trust Company], defendants Parker presented a claim of loss to the plaintiff and said parties entered into settlement negotiations . . . defendants Parker also represented to the plaintiff that the third-party defendants [Winans] had not divulged to them any defect in the title to Lot 2 or disclosed their knowledge of the claim of ownership of the United States to Lot 2" (Tr. 140).

The Court: And it was on that basis that you were negotiating?

The Witness: And also that Mr. Stegmann had no knowledge of the defect." (Tr. 1800)

Likewise, Attorney Marsh, who represented the Parkers at the conferences with the Title and Trust Company, testified:

"Q. [By Mr. Buell] Mr. Marsh, during these discussions that you have mentioned, it was at the least assumed by everybody, was it not, that Mr. and Mrs. Parker had no—received no knowledge or notice from the Winans family about the defect of the title prior to the time that they got their deed?

A. Oh, yes." (Tr. 1848)

During the negotiations between the Parkers and the Title and Trust Company, three different proposed contracts were prepared by the Title and Trust Company looking toward a settlement of the Parker's claim (Exhibit 7, Tr. 1901-1902; Exhibit 8, Tr. 1902-1907; Exhibit 9, Tr. 1908-1913). Each of these agreements contained the representation that:

"Whereas, the Parkers have represented to Company and hereby warrant that they had no knowledge of any defect in the title to said Lot 2 prior to their payment of the purchase price therefor and acceptance and recording of the deed to said property." (Tr. 1902, 1909)

In answer to questions by the District Court, Attorney Marsh testified that the Parkers had never objected to signing this representation:

"Q. [By the Court] That same recital appears in all three documents; does it not?

A. . . . and I know that we read these parts, these parts were read to him on 7 and 8. I do not remember any objection to them.

Q. That was not the basis of Parker's refusal to sign the agreement?
A. Not a bit." (Tr. 1851)

Further representations were made by the Parkers as to the non-disclosure to them by the Winans of any title defect when they staged a show of surprise when the Title Company displayed to them a file showing the Winans had obtained a settlement of a title insurance policy previously issued on Lot 2 and thus presumably would have had knowledge of the title defect[13].

Falsity of Representations[14]—The Findings of the District Court as to the falsity of the representations

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[13]"Q. [By Mr. Jaureguy] Surprised to learn that the Winans knew about this defect when they sold the property?
A. [Attorney Buell] He expressed some surprise. * * *
Q. Did they seem surprised when they saw the letter from Miss Winans to the title company that was in the file?
A. Well, there was—we all, as I said, went through the same discussion that we could not conceive how anybody would attempt to sell a piece of property for that amount of money in view of their knowledge of the circumstances without making a disclosure of their knowledge.
Q. Yes.
A. And Mr. Parker had told us that he did not know anything about the state of the title.
Q. Well, now, to get back to the question, did Mr. and Mrs. Parker express surprise when they read the letter from Miss Winans to the title company that is in evidence in this case?
A. Well, as I say, they did." (Tr. 1781-1782)

Alstadt, Title and Trust Company's Vice-President, also testified to the surprise expressed by the Parkers when they were shown this file (Tr. 1809-1810).

[14]F. XXII: ". . . on August 31, while on a surveying party on the premises, the third-party defendant Paul Winans, although not knowing that the defendant Chet L. Parker was interested as a principal in acquiring the interest of the third-party defendants in said Lots 1 and 2, discussed with defendant Chet L. Parker the nature and basis of the claim of ownership of the United States to Lot 2 and the settlement

made by the Parkers that the Winans had not disclosed to them the defect in the title to Lot 2, is supported by an abundance of testimony, noted below, showing disclosures to and knowledge of the Parkers of (a) the defect in the title to Lot 2, (b) the previous policy of title insurance on Lot 2 which had been settled by reason of the defect in the title thereto, and (c) the necessity of Congressional action to clear the Winans' title[15].

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of the policy of title insurance previously issued on said Lot 2 by reason of said claim of the United States" (Tr. 129).

F. XXX: "At all times during the negotiations for and the purchase of said property, the defendants Stegmann and Parkers knew that the United States claimed title to said Lot 2, . . . that third-party defendants Winans had previously obtained a policy of title insurance on said property . . . and had collected a substantial loss on such policy by reason of the Government's ownership of Lot 2; and that third-party defendants Winans had been advised that an act of Congress would be required to give them marketable title to such property" (Tr. 134).

F. XXXIII: "Although defendants Parker had been informed by Paul Winans that the United States claimed ownership to Lot 2, . . ." (Tr. 135).

See also, F. XV, Tr. 125; F. XXV, Tr. 130-131 re disclosures by the Winans to Stegmann and his knowledge of the defect in the title to Lot 2; F. XXVI, Tr. 131-132 re disclosure by the Winans to the attorney for Parkers at closing of transaction.

[15]As to the disclosures to and knowledge of the Parkers, see the testimony of Paul Winans (Tr. 831-836, 841, 846, 847, 907-908); Ross Winans (Tr. 1618-1619, 1641); Claude Parrott, U. S. Forest Service (Tr. 1049-1057, 1061-1062; Exhibit 71, Tr. 2182; Exhibit 72, Tr. 2183-2184); Joyce Petersen, U. S. Forest Service (Tr. 1066-1070); Attorney Kenneth Abraham (Tr. 943-944, 946-947, 1013); Attorney Vawter Parker (Tr. 989, 1008-1009).

As to the disclosures to and knowledge of Stegmann, see the testimony of Paul Winans (Tr. 797-798, 801-802, 839-841, 846-847, 850, 913-914, 1716-1718; Exhibit 311, Tr. 2265-2266); Ross Winans (Tr. 1615-1617, 1626-1631); Ethel Winans (Tr. 1603); Attorney Vawter Parker (Tr. 965, 968-970,

The basis for the Findings of the District Court as to the falsity of the Parkers' representations is clearly reflected in the opinion of the Court:

> "This is not a case of an honest mistake. Neither in their pleadings nor in the evidence adduced at the trial did the Parkers admit that they knew of the defect in title until after the full purchase price had been paid and a deed delivered.
>
> "Throughout the case, they, as well as Stegmann, maintained that they had no knowledge of the defect in title and that neither the Winans nor anyone else had informed them of the claim of the United States to Lot 2. The testimony of the Parkers and Stegmann was not corroborated on any material issue by any credible independent evidence. Their own testimony was shown to be false in many particulars and, when not actually controverted, was highly improbable and, at times, fantastic.
>
> "On the other hand, the testimony of Paul Winans was corroborated not only by documentary evidence but also by the testimony of a number of disinterested reputable witnesses." (Tr. 107-108)

The Findings of the District Court being *thus* based on the trial judge's passing on the credibility of witnesses, this Court has "repeatedly held that, under such circumstances, it would not be inclined to disturb the findings of the lower court" (*Faivret v. First Nat. Bank in Richmond,* 160 F. (2d) 827, 829 (1947).

Likelihood of Harm[16]—The record clearly reveals

980-982, 1002, 1003-1004); Rettlaw Haynes, U. S. civil engineer (Tr. 1026-1028, 1034-1036); Clyde Linnville, real estate broker (Tr. 773, 776-781, 783).

[16]F. XLIII: ". . . Said misrepresentations were material and were made with intent to defraud the plaintiff, and with the knowledge that the probable consequences of such false

that the Parkers knew that on the basis of their representations that the Title and Trust Company intended to file suit against the Winans for their *fraudulent* failure to disclose their knowledge of the defect in the title to Lot 2. Thus Attorney Buell, speaking of the settlement negotiations between the Title Company and the Parkers, testified:

> "Q. [By Mr. Krause] Maybe I can make it a little clearer. Your information that you were eliciting from him as to what Winans had said to him or represented and what he knew about the condition of the title, good or bad, that that information was needed by you in the preparation of a complaint that would be brought against the Winans?
>
> A. Yes.
>
> Q. That you informed him of?
>
> A. Yes." (Tr. 1795-1796)

In answer to questions of the District Court along this line, Attorney Buell further testified:

> "THE COURT: Was there any discussion with Mr. and Mrs. Parker to the effect that in a title suit they could not prevail unless there had been a misrepresentation made to the Parkers? In other words, if the Parkers knew of a defect, then Title and Trust could not prevail if it filed the action, the suit?
>
> The Witness: [Buell] I do not recall it being

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representations made to plaintiff would injure third-party defendants Winans" (Tr. 140-141).

F. XLVI: "Said representations by defendants Parker to plaintiff concerning the third-party defendants were made with the knowledge that the plaintiff would institute legal proceedings against the third-party defendants and that the third-party defendants would be subject to adverse publicity in Portland and in Hood River and would require them to incur expenses to defend such proceedings and to clear their names and reputations of false imputations of crime and dishonesty cast upon them by the defendants" (Tr. 142).

stated as bluntly as that. They were both advised that the basis of the suit would be misrepresentation of the state of the title by the Winans or a concealment of their knowledge of the defect." (Tr. 1799-1800)

In a similar vein, Attorney Dashney who had represented the Parkers at the conferences with the Title and Trust Company, testified:

"Q. [By Mr. Buell] Mr. Dashney, do you recall at the conference on the 27th Mr. Parker was there and that after we finally reached a tentative agreement or verbal agreement to go ahead and settle and sue—or rescind the transaction, that we explained to Mr. Parker in general terms what the basis for a suit for rescission against the Winans family would be?

A. Yes, I believe we did, Mr. Buell." (Tr. 1857)

It should, of course, be kept in mind that in each of the proposed contracts between the Title and Trust Company and the Parkers, whereby their claim was to be settled and wherein the Parkers represented that they had no knowledge of any defect in the title, provision was made for the institution of suit against the appellees Winans (Exhibit 8, Tr. 1903-1905; Exhibit 9, Tr. 1909-1911).

Harm Inflicted[17]—The evidence relating to the dam-

[17]F. XLVII: "Such false representations made by defendants Parker were largely responsible for the inclusion of third-party defendants Winans as defendants in the original action filed by plaintiff. Such action and the publicity which it received in both Portland and Hood River newspapers caused injury and damage to the third-party defendants Winans in that it not only required them to expend their own time in the preparation and trial of this case but also required them to employ and pay for the services of attorneys to represent them in such action. Such action and pub-

ages suffered by the Winans is set forth in a subsequent part of this brief (pp. 48-51). For the present, we need only to note appellants' argument that the actions and representations of the Parkers played no part in the filing of the original action by the Title and Trust Company against the Winans.

Can it be doubted for one moment that a suit would not have been instituted against the Winans charging them with fraud, if the Parkers—or Stegmann[18]—had informed the Title and Trust Company of the full disclosure which had been made to them by the Winans, instead of falsely representing that they had no knowledge?

Having made a full disclosure of the property they sold and having only deeded away their "right, title and interest," the Winans were, of course, not subject to suit by anyone. The Parkers knew these true facts, but chose to deceitfully conceal their knowledge from the Title

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licity resulting therefrom likewise made it more difficult for third-party defendants Paul Winans and Linnaeus Winans to obtain credit in connection with their respective businesses" (Tr. 142-143).

F. XLVI: ". . . plaintiff did institute the present suit in which the complaint charged that the third-party defendants falsely represented they were the owners of a marketable title to Lot 2 and that none of the third-party defendants disclosed to the defendants Parker and Stegmann the claim of ownership of the United States to Lot 2 or the settlement of the policy of title insurance issued by the Pacific Abstract Title Company on Lot 2 as a result of said claim of the United States. . . ." (Tr. 142).

[18]The record indicates that after the Title and Trust Company learned of the title defect to Lot 2, it made an investigation of Stegmann and contacted him by phone (Tr. 1776-1777, 1793-1794).

Company and to falsely misrepresent that no disclosure had been made to them by the Winans. For the effect of the Parkers' deceit in their dealings with the Title and Trust Company, we have only to look to some of the allegations of both the original complaint[19] and the amended complaint[20].

3. Defamation

The appellees Winans charged in their cross-complaint (Tr. 88-90) and the District Court found that the Parkers (besides falsely representing that the Winans had not divulged to them any defects in their title to Lot 2) also by their words and conduct wilfully and intentionally induced the Title and Trust Company to believe that the Winans had represented themselves to be the owners of Lot 2 and to have a good title thereto.

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[19]Thus, paragraph XXV of the original complaint (Exhibit118) alleged "That neither Ethel Winans nor Paul Winans nor any other party represented by them disclosed to defendants Chet L. Parker, Lois M. Parker or Walter Stegmann the fact of or basis of the claim of ownership of the United States of America to said Lot 2 or the fact of the claim made by Ethel Winans against said Pacific Abstract Title Company on account of said claim of ownership and the settlement of said claim . . . and that if such a disclosure had been made, the said consideration would not have been paid" (Tr. 2248).

[20]Similarly, in the third-party complaint the Title and Trust Company alleged that "third-party defendants represented to Parkers and/or Stegmann as the agent of Parkers that Ethel Winans had a good marketable title to the said Lot 2"; that "third-party defendants knew that said representations were false and knew the reasons and facts pertaining to the defect of the title of Ethel Winans to said Lot 2 and to the basis of the claim of the United States to ownership of said property"; and that the "Parkers relied on said representations" (Tr. 63-64).

The District Court further found that these false representations and actions by the Parkers constituted slander of the Winans by imputing to them the commission of a crime within the meaning of Section 23-550, O.C.L.A.[21] by having falsely represented that they were the owners of land to which they had no title and by conveying such land with intent to defraud the Parkers (F. XLIII, Tr. 140-141; F. XLV, Tr. 142).

(a) *Slander per se*

Under Oregon law, as under the law generally, words imputing the commission of a crime for which a person is liable to indictment and punishment in the penitentiary are actionable as slander per se without the need of proving special damages. *Davis v. Sladden,* 17 Ore. 259, 266 (1889); *Barnett v. Phelps,* 97 Or. 242, 244-245, 191 P. 502, 503 (1920); *Quigley v. McKee,* 12 Or. 22 (1885); Restatement of Torts, Sec. 571, Vol. III, pp. 171-175. The material element "which lies at the foundation of the action" is said to be "social disgrace, or damages to character in the opinion of other men" (*Quigley v. McKee,* 12 Or. at 23).

As to the form or nature of imputation, it is not necessary that the charge be made in a direct, positive

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[21]Section 23-550, O.C.L.A. (presently ORS 165.220) read as follows:

"If any person shall falsely represent that he is the owner of any land to which he has no title, or shall falsely represent that he is the owner of any interest or estate in any land, and shall execute any conveyance of the same with intent to defraud anyone, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than two years."

and open manner, or that any particular crime be specified by name or description, or that the words used follow the technical terms of the indictment. In considering the words used, the court may look to the circumstances surrounding their utterance. *Peck v. Coos Bay Times Pub. Co.,* 122 Or. 408, 420, 259 P. 307, 311 (1927); 33 Am. Jur., Libel and Slander, Secs. 9, 11, and 12, pp. 43-46; Restatement of Torts, Sec. 571, Comment (c), Vol. III, p. 172; *Christopher v. American News Co.,* 171 F. (2d) 275 (7th Cir. 1948); *Sandifer v. Electrolux Corporation,* 172 F. (2d) 548 (4th Cir. 1949).

Here the Findings of the District Court make it clear that the Parkers by their words and actions had intentionally induced the Title and Trust Company to believe that the Winans had falsely represented themselves as being the owners of a good title to Lot 2, the circumstances surrounding their utterances and representations being that the Winans had conveyed Lot 2 to the Parkers without disclosing any defect in the same. Admittedly, the Parkers did not also state in words that the conveyance had been made with "intent to defraud"; but in imputing the crime covered by the statute it was not necessary for the Parkers to charge that it was done with intent to defraud. See *Keller v. Safeway Stores, Inc.,* 111 Mont. 28, 34-35, 108 P. (2d) 605, 609-610 (1940).

Appellants Parker, however, contend that the Parkers did not impute the commission of the crime because Ethel Winans was the only person who could have committed the crime and the Parkers never made any

representations to the Title and Trust Company concerning her (P. Br. 70-72).

Appellants' argument runs counter to the settled law of defamation. Whether Paul Winans could or could not have been guilty of violating Section 23-550, O.C.L.A., is beside the point[22]. "The sound rule is," said the Court in *Rea v. Harrington,* 58 Vt. 181, 186 (1885), "that if the words impute a crime they are actionable per se, even though the charge could not be true. It is the obloquy of the charge that produces the damage, and not the exposure to punishment."

Thus, it is actionable to impute the commission of a crime, regardless of whether the person charged could not commit the crime or whether, in fact, no crime had actually been committed. See 53 C.J.S., Libel and Slander, Sec. 53 (c) p. 106; *Lee v. Crump,* 146 Ala. 655, 40 So. 609 (1906); *West v. Hanrahan,* 28 Minn. 385, 10 N.W. 415 (1881); *Stewart v. Howe,* 17 Ill. 71 (1855); *Quigley v. McKee,* 12 Or. 22, 23 (1885).

Appellants also contend that there is no evidence whatsoever in support of the District Court's Finding

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[22]We, however, disagree with appellants' contention that Ethel Winans was the only person who could have committed the statutory crime. Oregon statutory law (ORS 161.220) abrogates the distinction between an accessory before the fact and the principal and provides that "all persons concerned in the commission of a felony or a misdemeanor, whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals and shall be indicted, tried, and punished as principals." Accordingly, even though Ethel Winans was the record holder to Lot 2 and actually executed the conveyance thereof, it would still have been possible to indict Paul Winans as a principal on the basis that his representations aided and abetted in the commission of the statutory crime.

with respect to any words or conduct by the Parkers imputing the commission of the statutory crime (P. Br. 79-83). It is, of course, difficult to reconcile such a contention with the sworn testimony of Chet Parker given at his deposition some five months prior to the trial:

> "Q. *Did you ever tell any of these persons Mr. Buell has named as being present at any of these meetings* [between representatives of the Title and Trust Company and the Parkers] *that Paul Winans told you he had a good and marketable title to this property which he was selling you?*
>
> A. *I remember saying that, yes.*
>
> Q. Did you also say that Paul Winans had never told you anything about the Government making a claim to the back 40 acres?
>
> A. I don't know whether I told him or not.
>
> Q. I am not asking about that. I am asking you what you told them.
>
> A. Well, I don't remember of telling them that.
>
> Q. Could you have told them that?
>
> A. I possibly could have.
>
> Q. Did you tell them that Paul Winans never told you anything about a policy of title insurance he had on that property which had been paid off by reason of the Government claiming ownership of the back 40 acres?
>
> A. I don't know that I told them that. I don't remember of telling them that. I probably did" (Tr. 2067-2068) (Emphasis supplied).

In confirmation of this, we have the entry in the Parkers' diary referring to the meeting on October 12 with the Title and Trust Company, in which Chet Parker wrote in his own hand:

> "I told them I thought Winans thought they owned the property or they would not have gave me a deed for it" (Tr. 2236).

Along with this testimony, there must also be considered the testimony previously set out (supra, pp. 27-29) that at the conferences with the Title and Trust Company the Parkers represented that the Winans had never disclosed to them any defect in the title to Lot 2 or their knowledge of the claim of ownership of the United States and that all of the conferences between the Parkers and the Title and Trust Company were predicated on this assumption. The utterances of the Parkers in these surrounding circumstances were what, the District Court found, induced the Title Company to believe that the Winans had falsely represented themselves to be the owners of Lot 2 with a good title thereto and conveyed the same. By inducing such a belief in the Title Company the Parkers were imputing the commission of a crime to the Winans.

(b) *Slander per quod*

Even if the appellants' words and conduct are not said to constitute slander per se, they would still be actionable to the extent of the special harm caused by them, as defamatory communications tending to harm the reputation of the Winans and to lower then in the estimation of the community and to deter third persons from associating or dealing with them. *Barnett v. Phelps,* 97 Or. 242, 191 P. 502 (1920). In such a case, the Winans would be entitled to recover not only for the special harm caused to them but also for their general loss of reputation. See Restatement of Torts, Secs. 559 and 575, Vol. III, pp. 140-143, 185-187.

The special damages which were pleaded and proven by the appellees Winans as a result of the defamatory communications made by the Parkers to the Title and Trust Company are discussed, infra, pp. 49-51.

(c) *Libel*

The allegations[23] concerning the Winans published in the original complaint filed by the Title and Trust Company were libelous per se, imputing not only the commission of a crime in violation of Section 23-550, O.C.L.A., but also exposing the Winans to ridicule, contempt and disgrace in the community of Hood River, Oregon. See e.g. *Woolley v. Plaindealer Pub. Co.,* 47 Or. 619, 84 P. 473 (1906); *Woolley v. Hiner,* 164 Or. 161, 100 P. (2d) 608 (1940); and generally, Harper, Law of Torts, Sec. 243, pp. 518-522.

As we have previously emphasized, the Parkers' defamatory and intentionally false representations made with knowledge of the use to which they were going to be put by the Title Company were the legal starting place for the subsequent publication in the complaint of the defamatory allegations concerning the Winans.

Under the circumstances, various courts have held that an action for libel will lie against those causing the inclusion of defamatory allegations in an otherwise privileged writing. *Laun v. Union Electric Co.,* 350 Mo. 572, 166 S.W. (2d) 1065 (1942); *Rice v. Coolidge,* 121 Mass. 393 (1876); *Ewald v. Lane,* 104 F. (2d) 222 (D.C.

[23]See particularly Paragraphs XVII and XXV, Exhibit 118 (Tr. 2246, 2248).

D.C. 1939); *Bigelow v. Brumley,* 138 Ohio St. 574, 37 N.E. (2d) 584 (1941); Annotation, 144 A.L.R. 633-635.

C. Appellants' Claim of Privilege

In their briefs appellants for the first time during this entire case assert that their words and conduct to the Title and Trust Company were absolutely privileged, for which there can be no liability (P. Br. 73-76; S. Br. 11-12).

1. Intentional Harm

Privilege is a doctrine peculiar to the law of libel and slander. Insofar as the Winans' cross-claim against the appellants involves liability resulting from their conspiracy to defraud the Title Company or under the principles applicable to liability for intentional falsehoods and malicious wrongs, the common law rules as to libel and slander are not involved and the defense of absolute privilege would not be applicable.

Thus, in *Schauder v. Weiss,* 88 N.Y.S. (2d) 317, aff'd. 276 App. Div. 967, 94 N.Y.S. (2d) 748 (2nd Dept. 1950) the plaintiff alleged a conspiracy between two defendants and her husband to institute a fraudulent divorce action against the plaintiff on the basis of a false report by one of the defendants that the plaintiff had committed adultery. In striking a defense of privilege interposed by the defendants, the Court stated:

> "The fact, however, that plaintiff's alleged grievance was sustained as a result of wrongful acts which do not spell out one of the commonly recognized torts does not mean that plaintiff has no cause of action at all. On the contrary . . . the trend of the deci-

sions of our courts has been towards the establishment of the broader doctrine that 'harm intentionally done is actionable if not justified' * * *

"In the light of the doctrine enunciated in the foregoing cases, it would seem that the facts alleged in the fourth cause of action plead a right of action basically similar to that in Al Raschid v. News Syndicate Co., supra, which may be characterized as an 'action on the case' or, to quote from the learned English author, Sir John Salmond, an action for 'injurious falsehood'. . . *To such action the stringent rules of libel and slander do not apply and consequently the defense of privilege may not be interposed.* . ." (88 N.Y.S. (2d) at 322-323) (Emphasis supplied)

To say that there is a defense of absolute privilege to an action on the case to recover damages for harm intentionally and maliciously inflicted would be to deny the doctrine itself. Only a superior right can conceivably justify causing harm to another through intentional and malicious falsehoods. The record in this case is barren of any such justification, revealing only the brazen falsehoods perpetrated by the appellants as part of their scheme to defraud the Title Company.

Appellants Parker have sought in their brief to find legal justification for their acts by contending that the Winans' claim against them is one for "instigating a groundless suit" (P. Br. 69). Asserting that there is no liability for the malicious prosecution of a civil suit, appellants contend (though citing this court no authority whatsoever) that one who causes a party to file a civil malicious prosecution must therefore also not be liable (P. Br. 77-79).

In other words, appellants are contending that an accessory cannot be held civilly liable where a principal cannot be, a criminal law notion which was rejected as long ago as *Rice v. Coolidge,* 121 Mass. 393, 396 (1876), where the court held that even though a witness had an absolute privilege to give false and defamatory testimony, the person who caused him to give such testimony could still be liable, saying:

> "The argument, that an accessory cannot be held civilly liable for an act for which no remedy can be had against the principal, is not satisfactory to our minds. The perjured witness and the one who suborns him are joint tortfeasors, acting in conspiracy or combination to injure the party defamed. The fact that one of them is protected from a civil suit by a personal privilege does not exempt the other joint tortfeasor from such suit."

The inequity of appellants' argument is apparent in the instant case: Does it seem fair that one who maliciously causes another to institute mistakenly but in good faith a harmful lawsuit should be free from liability to the persons injured thereby?

In any event, the Winans' cross-claim may scarcely be pigeon-holed as a civil malicious prosecution suit; but if it were, an action would still lie for intentionally giving false information to another resulting in harm, even though no cause would lie for malicious prosecution. *Al Raschid v. News Syndicate Co., Inc.,* 265 N.Y. 1, 191 N.E. 713.

2. Defamation

Insofar as the Winans' claim involves the liability of the appellants for defamation, the appellants' claim of

absolute privilege is unwarranted both factually and legally.

Factually, appellants Parker have premised their argument upon the basis that the representations of the Parkers to the Title and Trust Company were "*for the purpose* of having the information thus given used by the attorneys for the Title Company in bringing an action in which the Winans would be made parties defendant" (P. Br. 72-73). This is misleading. The true nature of the conferences between the Parkers and the Title and Trust Company is set forth by the District Court as follows:

> "Following discovery of the defect in title to Lot 2 by the plaintiff, defendants Parker presented a claim of loss to the plaintiff and said parties entered into settlement negotiations" (F. XLIII, Tr. 140).

The purpose of these conferences was to settle the claim of loss which the Parkers had presented and for which they had retained their attorneys (Tr. 1839). At these conferences the respective parties—the Title and Trust Company and the Parkers—bargained and negotiated at arms length, each being represented by their own attorneys, but none of the settlement proposals of either side was satisfactory to the other[24].

Legally, we again call this Court's attention to the fact that appellants' claim of absolute privilege makes its first appearance in this case in their briefs. Such a claim of privilege was not pleaded by either the Parkers or by Stegmann in their respective answers to the Wi-

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[24]See Exhibits 10-B, Tr. 1918-1920; Exhibit 10-C, Tr. 1921-1923; Exhibit 10-D, Tr. 1924.

nans' cross-claim, nor did it ever come up during the course of the trial. Accordingly, such a claim may not now be raised, since it is settled law under the Federal Rules of Civil Procedure applicable to this case that a claim of privilege is a special affirmative defense which must be specially pleaded as well as proved. *Christopher v. American News Co.,* 171 F. 275, 277 (7th Cir. 1948); *Foltz v. Moore-McCormack Lines, Inc.,* 189 F. (2d) 537, 539 (2nd Cir. 1951).

Secondly, the limited authorities we have been able to uncover do not uphold appellants' claim of absolute privilege. On the contrary, we submit that the cases which have specifically analyzed the issue presented of whether persons in appellants' situation may find a safe haven for their actions in a claim of privilege, have held that any absolute privilege with respect to defamatory matters in pleadings does not extend to or protect persons not parties to the action who are responsible for the inclusion of such defamatory matter. *Laun v. Union Electric Co.,* 350 Mo. 572, 166 S.W. (2d) 1065 (1942); *Rice v. Coolidge,* 121 Mass. 393 (1876); *Ewald v. Lane,* 104 F. (2d) 222 (D.C. D.C. 1939); *Bigelow v. Brumley,* 138 Ohio St. 574, 37 N.E. (2d) 584 (1941); Annotation, 144 A.L.R. 633.

In the *Laun* case, supra, which we commend to this Court as containing an excellent discussion of the problem, the Missouri Supreme Court noted that the rule of absolute privilege was founded on the principle that on certain occasions it is advantageous to the public interest that a person should speak freely and fearlessly unin-

fluenced by the fear of being sued for defamation, the end to be gained by permitting such statements outweighing the harm which might be done to the reputation of others. However, the tendency and policy of the Courts has been not to extend the instances of absolute privilege, unless the policy upon which the privilege is based is found to exist in new situations. Where we have the case of persons who have some kind of interest in the proceedings and who aid and assist a party in publishing defamatory matter in a pleading, there is no reason or principle for public policy demanding the extension of the doctrine of absolute immunity to those who have thus caused the publication of libelous matters by persons who were privileged to do so.

There would appear to be no Oregon law on the point. *Strycker v. Levell,* 183 Or. 59, 190 P. (2d) 922 (1948), cited by appellants (P. Br. 74-75), is not in point, for there the plaintiff was not proceeding against those who had deceitfully been responsible for the inclusion of defamatory matter in a pleading, but was suing the very persons who had themselves as part of a judicial proceeding filed allegedly defamatory affidavits[25].

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[25]As to any possible claim by the Parkers that their representations to the Title Company were conditionally privileged as communications between an insurance company and a policyholder, the appellants' communications were not spoken in good faith or with an honest belief of the truth but were made maliciously. Under these circumstances, as this Court recently held in *Reserve Life Ins. Co. v. Simpson,* 206 F. (2d) 389 (1953) no privilege may be claimed, citing Oregon decisions.

D. Damages

The Winans alleged in their cross-complaint (Tr. 90) and the District Court found that the present suit instituted by the Title and Trust Company and the subsequent publications of the charges therein in a Hood River newspaper damaged the Winans in that they were required to spend their own time preparing for the trial of this case and had to employ and pay for the services of attorneys in representing them, and in that it was more difficult for two of the Winans to obtain credit in connection with their businesses.

The District Court further found that as a result of appellants' "injurious falsehoods" and "slanderous statements" the Winans suffered damages in the sum of $9,000 (F. XLVI, Tr. 142; F. XLVII, Tr. 142-143).

Before considering the applicable authorities, we shall first dispose of appellants' challenge to Findings of the Court (P. Br. 85-90; S. Br. 11).

1. Evidence

In substantiation of the Findings of the District Court, the record discloses that as a result of the wrongful acts of the appellants culminating with the Winans being subjected to a lawsuit in which they did not belong, the Winans suffered damages to their reputation and to their businesses and were forced to incur litigation expenses.

As to their reputation, the record is replete with evidence that any matter affecting property on the shores of Lost Lake was a matter of extreme public interest to

all those living in the Hood River area (Tr. 1677-1678, 1694-1695, 1726; Exhibit 15-A, Tr. 1925). Consequently, news articles dealing with the sale of the Winans property on Lost Lake were widely read; and all of the witnesses from the Hood River area appearing before the District Court testified as to their familiarity with the articles in the Hood River newspapers concerning the filing of the suit against the Winans over the Lost Lake property (Tr. 1624, 1678, 1680, 1686-1687, 1696, 1728). It is uncontradicted in the record that the charges against the Winans of falsely representing their property were widely discussed (Tr. 1680, 1687, 1696). Hood River County Judge Sheldrake, who had known the Winans family for approximately 35 years and testified that the reputation of the Winans for honesty and integrity was good, stated that after the publication of the charges he heard numerous discussions during which perhaps as many as a dozen or 20 persons expressed the belief that Paul Winans would have done what was reported in the paper (Tr. 1697-1699).

Both Paul Winans and Ross Winans recounted that following the publication of the filing of the complaint many persons had questioned them about it (Tr. 1624, 1728). It is scarcely any wonder that Paul Winans testified that it was a matter of embarrassment to him to be charged with fraud and that it had affected his business operations (Tr. 1728-1729).

Secondly, the record shows that as a result of the institution of this suit against the Winans, the Hood River Branch of The First National Bank of Portland,

which had financed Paul and Linnaeus Winans for over 20 years in their logging operations with unsecured loans (except on machinery), required that substantial collateral be posted on all loans (Tr. 1680, 1681, 1683, 1729). Similarly, a plumbing and heating contractor who had been engaged in doing work on two homes in a housing development project of Paul Winans refused to extend any more credit until Winans paid him $500 and credit difficulties were experienced with two other subcontractors on the project (Tr. 1687-1691, 1729-1730). Paul Winans himself, as a result of the time he spent defending against this case, lost over three months' time which he would have otherwise spent in his logging and housing businesses (Tr. 1695, 1731-1732).

Thirdly, the record shows that in order to defend themselves against the present case filed against them by the Title Company, the Winans retained attorneys upon an agreement to pay them the reasonable value of their services (Tr. 1733). There is set forth in the record an extensive itemization of the 853 hours of legal services performed by the attorneys for the Winans, together with testimony as to the value of these services and an itemization of expenses of $576.80 incurred by the Winans which were not reimbursable as statutory costs and disbursements (Tr. 1868-1876). On the basis of the reasonable value of these services alone, the District Court could have properly awarded the Winans damages in excess of $9,000.

In their brief (pp. 91-92) appellants Parker object that there is no segregation in the itemization of legal services performed as between the defense and the pro-

secution of various claims and that in the thirteen subjects of research none related to the Winans' claim against Parkers. Of course, there was no itemization of services rendered and research done with respect to prosecuting the Winans' claim against the appellants. The purpose and point of the testimony with respect to legal services was that these were the litigation expenses which the Winans were forced to incur as a result of the tortious conduct of the appellants in deceiving the Title Company into getting them involved as defendants in this case. Hence, there was only an itemization of such services as related to the defense of the Winans.

2. Authorities

For the direct and consequential damages which the appellants caused the Winans as a result of their conspiracy to defraud the Title Company and of their intentional falsehoods and malicious wrongs, the appellants were clearly liable as a matter of law to at least the special damages caused thereby. In this case these special damages were pleaded and proved as consisting of the litigation expenses herein, including attorney fees, incurred by the Winans.

In like manner, in *Cooper v. Weissblatt,* 154 Misc. 522, 277 N.Y.S. 709 (2d Dept. 1935), as the result of intentional deceit on the part of the defendants, the plaintiff was forced to defend an action in another state and then brought an action to recover the litigation expenses and attorneys fees he had expended in defending the former action. In affirming the judgment for the plaintiff for such expenses as damages, the Court pointed

out that the plaintiff was injured through intermediate agencies set in motion by the fraud of the defendant and that he was entitled to recover the legal expenses he was forced to undergo as a result of action taken against him by such intermediate agencies.

This is in accord with the often recognized common law principle that where the wrongful act of a defendant has involved a plaintiff in litigation with others, making it necessary for him to incur expense to protect his interest, the costs and expenses, including attorneys fees, sustained by the plaintiff in the litigation with such third person are viewed as a legal consequence of the original wrongful act of the defendant and may be recovered as damages. 25 C.J.S., Damages, Sec. 50 (c), pp. 534-535; 15 Am. Jur., Damages, Sec. 144, p. 552; Restatement of Torts, Sec. 914, Vol. IV, pp. 591-593; *Security State Bank v. Johnson & Co.,* 204 Okla. 160, 228 P. (2d) 169 (1951); *Tarnowski v. Resop,* 236 Minn. 33, 51 N.W. (2d) 801 (1952); *Curtley v. Security Savings Society,* 46 Wash. 50, 89 P. 180 (1907); *Murphy v. Fidelity Abstract & Title Co.,* 114 Wash. 77, 194 P. 591 (1921).

In the *Security State Bank* case, supra, the plaintiffs brought action against defendants X and defendant Y to foreclose material liens. Defendants X brought cross actions against the defendant Y to recover damages for alleged wrongful acts in misapplying certain funds. The court held that defendants X were entitled to damages against defendant Y as measured by the attorneys fees and expenses which defendants X had incurred in defending the action brought by the plaintiff, quoting the

following language from *McGaw v. Acker,* 111 Md. 153, 73 At. 731, 734, with approval:

> ". . . where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relations with others as make it necessary to incur expense to protect his interest, such costs and expenses shall be treated as legal consequences of the original wrongful act" (204 Okla. at 164, 228 P. (2d) at 173).

On the record in this case and on the facts as found by the District Court, the Winans are also entitled as a matter of law to damages against the Parkers for defamation. For being falsely accused of criminal conduct —whether it be on the basis of slanderous utterances and conduct or on the basis of being responsible for libelous allegations in the complaint—the Winans are entitled to recover general damages for the harm done to their reputation and special damages for any particular losses they sustained. Restatement of Torts, Secs. 571 (h), 621 and 622, Vol. III, pp. 175, 313-314, 316-318.

The District Court taking all the evidence into consideration came to the conclusion that an award of $9,000 would compensate the Winans for all the harm they had sustained at the hands of the appellants. The Winans had sought $70,000 general damages, $20,000 special damages and $100,000 punitive damages. Despite the aggravated circumstances of the case, the District Court allowed no punitive damages though unquestionably authorized to do so under Oregon law[26].

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[26]See *Linkhart v. Savely,* 190 Or. 484, 505-506, 227 P. (2d) 187, 197 (1951).

As is the situation with a jury verdict, we do not know how the District Court arrived at the award it made; but we do know that the evidence of harm to reputation, of credit difficulties and of litigation expenses substantially supports the award made, no matter how much more we believe the Winans were entitled to.

II.

The District Court did not Err in Dismissing the Cross-Claims of the Appellants Against the Appellees Winans.

Appellants Parker have specified as error the dismissal of their cross-claim against the appellees Winans (P. Br. 68). Appellant Stegmann has likewise specified the dismissal of his cross-claim against the appellees Winans as error (S. Br. 10).

Neither the brief submitted by the Parkers nor the brief submitted by Stegmann presents any argument in support of this specification of error.

The cross-claim of the appellant Chet Parker was that he should recover over from the appellees Winans the sum of $125,000, in the event that the Title and Trust Company obtained a cancellation of its title insurance policy, his claim being "based upon the allegations of plaintiff's complaint and of the counterclaim of defendant Chet L. Parker" (Tr. 94-95). Appellant Stegmann had similarly filed a cross-claim against the appellees Winans seeking to recover over against the Winans any judgment entered in favor of the Title and

Trust Company and against Stegmann, and to recover $10,000 attorneys fees by reason of the Winans "intentionally failing to disclose to defendant Stegmann the claims of the United States Government to said real property".

We submit that the Findings of the District Court as to the disclosures by the appellees Winans to the appellants Parker and Stegmann, which have heretofore been reviewed, completely lay at rest any conceivable claim which the appellants might assert against the Winans in connection with the transactions involved in this case. The Findings of the District Court in this regard being based, as we have seen, upon conflicting testimony and supported by substantial evidence in the record, are foreclosed to the appellants on this appeal.

CONCLUSION

For the reasons set forth above, the judgment below, awarding the Winans $9,000 damages and costs for the harm they sustained through the wrongful acts of the appellants and dismissing the respective claims of the appellants Parkers and Stegmann against the Winans, should be affirmed.

Respectfully submitted,

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No. 14201

United States
COURT OF APPEALS
for the Ninth Circuit

CHET L. PARKER and LOIS M. PARKER,
Appellants,

-vs-

TITLE AND TRUST COMPANY, a corporation, PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees.

APPELLANTS' REPLY TO BRIEF OF TITLE AND TRUST COMPANY

On Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, Judge.

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APPELLEE'S MISCONCEPTION OF FACTS

At the outset we wish to call attention to what seem to us to be serious errors on the part of the Title Company's attorneys regarding the facts of this case.

Parkers' Information Regarding Title. Counsel are, of course, clearly in error in stating, in effect, on p. 16, that Parkers knew that Winans had no title. The court

made no such finding. The court went as far as any evidence possibly suggested (and rejected Parker's own testimony) when it found that the Parkers had been advised that Winans' title "was in question" (F. 17; R. 128) and that "the United States claimed ownership" (F. 33; R. 135).

The evidence relating to the knowledge of the Parkers is set forth in our original brief, pp. 16-9; and we also call attention to Appendix A of that brief, in which will be found irreconcilable conflicts between the testitimony of Paul Winans and his brother Ross respecting alleged notice to Parkers.

The Contracts Between the Title Company and the Parkers. It is important to note that the first transaction was the order for a *title report* (F. 20; R. 128), the Company noting on its records that a title policy "was subject to a timber cruise" (F. 21; R. 129). Thereafter Parker obtained a purchaser's title policy, having learned from his attorney, Ferris, that he could buy such a policy. It was only for $125,000.00 although at that time he was engaged in negotiations to sell the property for $180,000.00 (See our original br., pp. 13-4).

The Title Company's brief assumes (p. 59) that thereafter it was merely a case of issuing an *owner's* policy in exchange for a *purchaser's* policy, the rights and liabilities otherwise remaining the same. But they are mistaken. The Title Company in the meantime had taken another look at the title. It discovered that there were no means of ingress or egress to or from the property; and so in the owner's policy there was added this

additional exception (R. 45). The Company thus relieved itself of an obligation theretofore incurred.

The "Metsker Map." On pp. 15-6 the brief states that Parker "even professed to know that a school land title would fail if it had not been completely surveyed; and that he always carried a map and checked on whether or not a school land section had been surveyed (R. 1807)". (Br. 15-6). But, as the citation to the record (R. 1807) makes clear, the witness merely purported to state what Parker "professed" as of the time negotiations were being carried on for a possible settlement, not at any prior time.

It is, of course, true that Parker had carried the map, a Metsker map, and, as pointed out in our previous brief (Br. 21), he consulted this Metsker map before going on the property and found that it designated "W. R. Winans" as the owner of the property (Br. 21; see also R. 2213).

But the Title Company before they issued the title report also consulted *their* Metsker map (R. 194, 198-9, 233). Such a map, as the Title Company's brief suggests (p. 16) *does* disclose whether a school land section (and for that matter any other section) has been surveyed. It shows that the property here involved had not been surveyed (Ex. 110; R. 2213). So if, as the Title Company's brief intimates, knowledge that a school land section has not been surveyed should warn an intelligent examiner to search further, and we agree that it should, how can they justify their failure here to search further?

Other Erroneous and Misleading Statements in Title Company's Brief. Page 8. The statement that Stegmann took an option "after conferring with Parker" is entirely unsupported by the evidence.

Pages 8-9. It is said that "phase 2" of the conspiracy was to "inflate the apparent investment so that they could collect more from the Title Company", and (p. 9) in furtherance of this objective the Parkers "attempted to sell the property to Multnomah Plywood Corporation for $180,000.00, in order to show a substantial loss of profit". The uncontradicted evidence is that, although it is said that there was no "conspiracy" until August 16, the cruiser for Multnomah Plywood was asked on August 13 (R. 1307-9) to cruise the property and actually cruised it on the 14th, on which date Parker started negotiations (R. 1307-9, 2218). More detailed facts are given in our original brief, pp. 12-4.

Page 11. The statement that the security for the loan made by the Parkers to Stegmann in 1950 "probably was nonexistent", has no support whatsoever (see R. 393-9).

Pages 13-4. The brief states that on the date that Parker examined the property "Lot 2 . . . was posted with signs advising that it was part of the Bull Run Water Shed of the Mt. Hood National Forest" (R. 1052). What the witness actually said was that he had no information on the subject (R. 1053).

In discussing the legal propositions advanced in the Title Company's brief, we shall have occasion to refer further to what we consider inaccuracies in their state-

ments of fact, in cases where we believe such inaccuracies to be particularly prejudicial.

LEGAL OBLIGATION TO TITLE COMPANY OF APPLICANT FOR TITLE INSURANCE

(Title and Trust Br. pp. 14-24)

As a preliminary matter, we repeat that counsel are in error in stating that the Parkers knew of a "failure of title". The evidence is that they learned that the title title was "questionable" and that the Government made a claim.

Unfortunately counsel misunderstood the language of the Supreme Court of Oregon in *DeCarli v. O'Brien,* 150 Or. 35, 41 P.2d 411, when they cited that case (p. 17) in support of their contention that the title insurer is under no greater duty to the insured than other types of insurers. What the court said was this:

> "A contract guaranteeing a title is one of insurance rather than suretyship, so that it is governed *for purposes of construction* by the rules applicable to other insurance contracts." (150 Or. at 51, 41 P.2d at 417) (Italics added.)

The *Stipcich* case—*Stipcich v. Metropolitan Life Insurance Co.,* 277 U.S. 311, 48 S. Ct. 512, 72 L. Ed. 895—discussed in the Title Company's brief (pp. 17-8)—is a good case to illustrate the distinction between title insurance and life insurance. The physical condition of the insured in that case, making him uninsurable, was a duodenal ulcer. It was discovered by him subsequent to the time that he gave the Company his written applica-

tion. Nobody but the insured and his doctors knew about this. The insurance company could not go to publlic records, as it could in this case, to determine whether there was any reason why the insurance should not be issued. Stipcich paid his personal physicians to determine whether he had an ulcer; in the present case, the applicant paid the insurance company to determine whether a defect existed.

But there is a further important distinction between that case and this one. In giving its opinion in *Stipcich,* the Supreme Court said, in a footnote:

> "The result is often explained by saying that a statement in the application is a 'continuing representation', or 'is made as of the time of the delivery of the policy.' " (277 U.S. at 317, 72 L. Ed. at 898)

In fact this was the basis of the decision of the trial judge, Judge Robert S. Bean of the Oregon District Court, 8 F.2d 285, 286.

We note that the Title Company's brief at no place mentions the leading Oregon case of *Frederick v. Sherman,* 89 Or. 187, 173 P. 575, discussed in our original brief (pp. 25-6), with quotations from authorities set forth therein, but instead relies upon *Musgrave v. Lucas,* 193 Or. 401, 238 P.2d 780. (Br. 20-1). This case was cited in our original brief (p. 26). The quotation set forth in the Title Company's brief (p. 21) does not support any contention that in this case there was any duty to disclose anything to the Title Company. The necessity of a permit to dredge the river in that case emphasized in the Title Company's brief (p. 21), was not the im-

portant consideration. The court stressed two other facts, alleged in the complaint, to which defendant had demurred: (1) A written notice from the District Engineer in which it was "demanded that such acts be discontinued if prosecution was to be avoided" (193 Or. at 412-3); and, even more important, (2) the fact that the complaint alleged (see 193 Or. 407) that "defendants 'for the purpose of injuring and defrauding plaintiffs,' affirmatively and 'fraudulently represented to the plaintiffs that they knew of no reason why plaintiffs should not continue the operation of said sand and gravel business.'" (193 Or. at 413). The case, as stated, was decided on a demurrer to the complaint, not upon evidence.

Nor does the next case cited in their brief (pp. 21-2), *Arthur v. Palatine Insurance Company,* 35 Or. 27, 57 P. 62, aid the Title Company. The policy itself provided that it would be void "if the insured has concealed . . . any material fact" and the opinion (as our original brief pointed out, pp. 33-4) emphasizes that even when a policy so provides much more must be proven than a failure to disclose facts.

This then brings us to the first of the two title insurance case cited in appellees' brief. It is *Vaughn v. United States Title Guaranty & Indemnity Co.,* 137 App. Div. 623, 122 N.Y. Supp. 393, discussed in the brief on pages 22-3. There the purported conveyance to the insured was by means of a forged deed, procured by the insured's agent.

The purpose of procuring the deed was to obtain title insurance, in anticipation of condemnation pro-

ceedings. The court found that the insured had knowledge of facts which advised him that the deed must be a forgery. This deed was, of course, the basis of plaintiff's title and was presented to the title company as such. It was for this reason that the court in the *Vaughn* case denied recovery, for, as the court said:

> "The plaintiff's conduct was equivalent to a representation that, so far as he knew, the deed presented by him was genuine."

Another important distinction between the *Vaughn* case and the present one is that in *Vaughn* the defect was not a matter of record. The importance of this distinction is self-evident. Indeed, it seems to prevail even in cases where a policy provides, as the present policy does not, that a failure to disclose a defect known to the insured shall avoid the policy. Examples of this type of policy were involved in *First National Bank v. N. Y. Title Insurance Co.,* 12 N.Y. Supp. 2d 703, 715, and also in *Vernon v. Title Guarantee and Trust Co.* (Cal. App.), 46 P.2d 191, and in each case the court emphasized that the defect in question was not a matter of record.

Whether or not the policy involved in the *Vaughn* case had any such exception, does not appear from the report.

RELIANCE

(Title and Trust Br. pp. 25-9)

In our first brief (pp. 26-32) we referred to numerous authorities to the effect that one who has at hand the means of acquiring accurate information, particularly

if he actually makes an independent investigation, cannot claim to have relied upon the false statements of another. The Title Company's brief (pp. 28-9) ignores all these authorities, and relies principally upon a long quotation from the Oregon case of *Larsen v. Lootens,* 102 Or. 579, 591, 194 P. 699, 203 P. 621.

Actually, as clearly appears from the quotation which counsel set forth from the *Lootens* case (Br. 28-9) that decision stands for the proposition that while, "in the *ordinary business transactions* of life, men are expected to exercise reasonable prudence, and not rely upon others", nevertheless courts at times are called upon to protect "the simple-minded or unwary" from "positive intentional fraud". This case, accordingly, is not in point unless counsel claim that their title company in selling its expert services is not to be treated as engaging "in the ordinary business transactions of life" but rather in the class of the "simple-minded or unwary".

Furthermore, further language in the *Lootens* case, not quoted in the Title Company's brief, quoting from Ruling Case Law, makes it clear that, in Oregon, one who undertakes an independent investigation "will not usually be heard to say that he had the right to rely on such representations", made by the opposing party. (See 102 Or. at 592-3)

RESCISSION FOR "UNILATERAL MISTAKE"

If the doctrine of "unilateral mistake' as a basis for rescission is as contended for by the Title Company, then, as already suggested, the courts have all been in

grievous error in formulating the rules as to when a party who has been deceived with respect to material facts may and when he may not obtain relief from the courts.

The principal decision relied upon by the Title Company (Br. 30-2) is *Rushlight Co. v. City of Portland,* 189 Or. 194, 219 P.2d 732. There are obvious distinctions between that case and the present one. One of these is that, contrary to the assumption in the Title Company's brief (pp. 31-2), the Rushlight Company was found not to have been negligent. The findings stated:

> "The plaintiff made a substantial mistake in its bid; that said mistake was an honest mistake and was free from culpable negligence on the part of plaintiff." (189 Or. at 200)

This finding was affirmed by the Supreme Court (189 Or. at 205-6).

Another important distinction is based upon the fact that in the *Rushlight* case the question before the court was whether or not a bidder can withdraw his bid before it has been accepted. In other words, the question was whether the City was entitled to retain, as a windfall, $21,472.21 given it by mistake, when it had taken no action whatever, not even of entering into a contract. As said in *Holzmeyer v. Van Doren,* 172 Or. 176, 139 P.2d 778, quoted on p. 32 of the Title Company's brief (involving a release of a mortgage and acceptance of a deed in satisfaction thereof, in ignorance of an intervening lien):

"Some mistakes prejudice no one but those who commit them, and, therefore, cancellation will prejudice no one."

The brief also quotes from the Restatement of Restitution, sec. 59, that "A person who has conferred a benefit upon another by mistake is not precluded from maintaining an action for restitution by the fact that the mistake was due to his lack of care." That this quotation also has reference to benefits conferred upon volunteers is clear when one reads further from the Restatement, particularly comment (a), and the various illustrations given, e.g., an error in describing Blackacre instead of Whiteacre in a deed, or in making a second repayment of money borrowed, forgetting the first repayment, etc.

But the best answer to the Title Company's arguments, that cases such as *Rushlight* have some bearing here, is to take the actual decisions of the Supreme Court of Oregon, rendered both before and after that decision, involving attempts at rescission when actual contracts were entered into under mistakes of fact, the right to such rescission being based on alleged deceit by opposing parties. These cases also are a further answer to counsel's contention (Br. 28-9), already discussed, that *Larsen v. Lootens,* 102 Or. 579, 194 P. 699, 203 P. 621, governs here.

Miller v. Protrka, 193 Or. 585, 238 P.2d 753, decided almost two years after the *Rushlight* case, involved an attempt at rescission of a contract on the basis of alleged misrepresentations. The court noted (193 Or. at 591) the rule of law, apparently invoked by the Title Com-

pany, that "Rescission is often granted where an action for deceit could not be maintained" and that "if the transaction were the result of a false representation of a material fact, it could not stand against the injured party's right to rescind, however honestly made". But the court held there could be no rescission. One of the reasons was:

> "A purchaser must use reasonable care for his own protection and cannot rely blindly on the seller's statements but must make use of his means of knowledge and, failing to do so, cannot claim that he was misled." (p. 598)

To the same effect is *Gamble v. Beahm,* 198 Or. 537, 257 P.2d 882, also a rescission case, in which the court quoted from the leading case of *Shappiro v. Goldberg,* 192 U.S. 232. This was the fourth time the Oregon Supreme Court quoted from that decision, the other three cases, along with the quotation itself, being in our original brief, pp. 28-9.

Other cases in which the Oregon court has held there can be no rescission when parties seeking relief do not exercise diligence in using available means for ascertaining the true facts are *Ziegler v. Stinson,* 111 Or. 243, 252, 224 P. 641, 644, and *Fairbanks v. Johnson,* 117 Or. 362, 368, 243 P. 1114, 1116, referred to in our original brief at pp. 28-9.

IRRELEVANCY OF EVIDENCE OF FORMER TRANSACTIONS

(Title Company's Brief 36-9)

The Title Company's attorneys and ourselves do not seem to be far apart as to the *effect* of the admission of inadmissible evidence in Federal non-jury cases. As we said in our specification of error (Br. 9), elaboration of the specification was unnecessary since the objection was based upon the *irrelevancy* of the evidence; and of course evidence which was irrelevant at the trial does not become relevant when an appellate court is ascertaining the facts from the record made, regardless of the type of objections made in the court below, or whether objections were made at all.

One cannot prove that a man forged a note by proof that at other times he beat his wife or engaged in communistic activities. This cannot be done even to prove "purpose" or "intent". To use evidence of other alleged wrongful acts or transactions for any such purpose they must be of acts *similar* to those involved in the case being tried. Of the several cases we cited on this point (Br. 44-5), the Title Company's brief notes but one, *Wood v. United States,* 16 Pet. 342, 41 U.S. 342, 10 L.ed. 987, and the very portion of that opinion quoted in their brief (p. 38) expressly states that it is only "evidence of other acts and doings of the party *of a kindred character*" that is admissible.

The Title Company's brief also suggests (p. 37) that evidence of other transactions "in which Stegmann had

acted for Parker, either directly or indirectly, was relevant and proper on this issue"—of whether Stegmann was Parker's agent.

In the first place, there certainly is no proof that in other cases Stegmann was an agent for Parker in the purchase of property. The only reference to the record (R. 433-4) given in the brief (p. 37) proves, if anything, the exact opposite. The cited portion of the record has testimony to the effect: (1) that at one time Stegmann was an employee of Parker in "operating a loader"; (2) that there never had been any "arrangement" whereby Stegmann would try to locate timber for Parker (R. 434); and (3) that on one, perhaps two, occasions the Parkers had paid a "finder's fee" to Stegmann in connection with a purchase of timber.

Moreover, while the four cases cited in the brief (p. 37) support counsel's general statement "that an agency may be shown by circumstantial evidence and by a course of dealing" they lend no support whatever to their contention that any "course of dealing" shown here even remotely tends to prove that Stegmann was an agent of Parkers in the purchase of the timberland here involved. *Cooperative Copper, etc., Co. v. Law,* 65 Or. 250, 132 P. 521, involved the question whether one who located some mining claims was at the time an agent of a corporation and therefore under obligation to locate them for the corporation. Correspondence showed that he was. In *Boise-Payette Lumber Co. v. Dominican Sisters,* 102 Or. 314, 202 P. 554, the question was whether an agent for a general contractor was also agent of the owner so as to relieve a materialman of the ne-

cessity of sending a statutory notice to the owner; and despite considerable evidence of a "course of dealing" between the owner and the agent, the court held that there was no evidence of agency. *Held v. Puget Sound and Alaska Powder Co.,* 135 Or. 283, 295 P. 969, involved the question whether an agent who sold blasting powder had authority to warrant that it would produce a certain result. The court held that evidence of similar warranties on prior occasions, admittedly authorized, by the same agent to the same purchaser, was admissible to prove such authority. The last case, *Young v. Neill,* 190 Or. 161, 174, 220 P.2d 89, lays down the rule that in determining whether a husband on a given occasion was agent for his wife "evidence that he previously acted for her in the same type of transaction is admissible", but as the authorities cited in that case, 190 Or. at 174, clearly show, this rule is limited to persons standing in the relation of husband and wife. See particularly *Sidle v. Kaufman,* 345 Pa. 549, 29 Atl.2d 77, 81, and Restatement of Agency, sec. 22, comment (b), pp. 65-6.

EVIDENCE CLAIMED TO PROVE A FRAUDULENT SCHEME

(Title and Trust Br. 39-47)

Without, as we have just shown, pointing to any evidence establishing any agency relationship between the Parkers and Stegmann in the purchase of this property, appellants next launch upon an argument in which such agency is assumed. Considerable stress is laid upon the disagreement between Parker and Winans as to

whether the former was present on the evening that the option was exercised, subsequent to such exercise, August 18. They refer to this as "a crucial incident in the dispute between Winans and appellants".

Actually, as we pointed out in our original brief (p. 48), it would have served Parker's purpose better to have claimed that there was no such meeting. Counsel refer to this contention, but say:

> "The truth of the matter is that by the time Parker testified he realized that he might be chargeable as undisclosed principal with the revelations of Winans concerning the title flaw to his agent, Stegmann." (Title Company's Br. 41)

Accordingly, the brief adds that this was his motive for testifying (falsely they claim) that he was present on this occasion, on August 18.

But if corroboration of Parker's testimony is needed, we call attention to the entry in his diary setting forth what actually happened at the meeting in question (R. 2219). Now it is very clear that at the time the entries were made in this diary there was no such alleged motive to falsify. Mr. Parker testified that the entries ordinarily were made either on the day the events occurred or on the next day, and seldom more than two or three days later (R. 256-7, 1397). This diary, introduced in evidence by the Title Company (R. 1462) had been in the personal possession of Parker's attorney since shortly after December 6, 1951 (R. 1463), when the original complaint was filed—a complaint which made no suggestion that Stegmann was the agent of the Parkers (R. 2241-52).

Ordinarily, of course, a party's own prior statements, oral or written, are not admissible on his own behalf to bolster his testimony at the trial. However, not only was this diary produced at the request of (R. 217), and introduced by, the opposing party (R. 1462), but the principle is well-established that when a contention is made that a witness had a motive to falsify then *consistent* statements made prior to the inception of that motive are admissible. *Maider Steel Products Co. v. Zanello,* 109 Or. 562, 578, 220 P. 155, 161.

In their attempt to present some theory as to what Stegmann and Parker's plans were prior to August 16 (when they say the conspiracy was formed), counsel say (p. 43) that the scheme was that the Parkers "in the guise of innocent purchasers of the option could present Winans with a substantial claim for damages". But if they read the option they knew that the Winans were only agreeing to give a quitclaim deed, so that there could be no damages. Counsel must also have overlooked the legal proposition that an assignee of an option, like the assignee of a contract, gains nothing by being a "innocent purchaser".

ALLEGED BREACH OF POLICY CONDITION

(Title Company's Brief 47-60)

(1) Counsel argue as though this is an action upon the *purchaser's* policy (Br. 47-8). This is coupled with an argument (pp. 59-60) that "this was all one transaction". We have already shown that this could not possibly have been so, because after the purchaser's policy was delivered, and the premium therefor paid,

the Company discovered that both in the title report and in the purchaser's policy they had overlooked something. So in the owner's policy they added another exception, no means of ingress or egress. While it is true that the owner's policy was delivered "in accordance with their previous agreement" (p. 59), the Title Company is in no position, in view of the above important change, to argue that it was purely automatic. Finally, it is argued that the provision in the purchaser's policy "imposed a contractual duty on Parkers to disclose the defect and their failure to do so was a breach of that contract" (p. 60, see also 55), but the provision was *not* a contractual obligation. It was a condition only.

(2) There is no basis even for the assertion (Br. 57) that notice was received after the issuance of the purchaser's policy. That policy was received on September 4, as the Title Company's brief recognizes (pp. 47-8). They argue that *Stegmann* was given information thereafter (p. 57). However, this was nothing more than a repetition of what he had learned before—that the Government claimed the property. Furthermore, whatever may be said about Stegmann's alleged agency in purchasing the property (on which we are in violent disagreement with counsel), nobody can conceivably contend that there was any agency with respect to anything connected with the title insurance. With respect to the other occasion mentioned (Br. 57), that of notice to Kenneth Abraham, the findings affirmatively state that Abraham was not an agent for the purpose of determining the state of the title (F. 26; R. 131); and further,

even prior to obtaining the information, he had paid the balance of the purchase money (R. 132).

(3) It seems to us that counsel have misconstrued the *Hoffman* case (Br. 50-4). The basis of the decision in that case was, as we stated in our original brief (p. 60) that the "information as to the happening of the accident was so indefinite and uncertain in its nature as to constitute no notice to plaintiff that an accident covered by the policy had happened". Now the policy in that case provided that "upon the occurrence of an accident" the company must be notified. In the present case, the language of the policy requires notification to the Company only "upon receipt of notice". Counsel have not commented upon the argument in our brief (p. 59) regarding the meaning of "receipt of notice". Under any logical construction of the language, information received by Parker was not "receipt of notice of any defect, lien or encumbrance".

The case of *Title Insurance Co. of Richmond v. Industrial Bank,* 157 S.E. 710, referred to on page 49, did not reach any of the questions presented here. One of the agreed facts there was that the insured *did* receive a written notice, in the form of a certificate signed by a trustee charged with the responsibility of a sale, setting forth the liens, and the only question was regarding the time within which notice thereof must be given to the Company.

Respectfully submitted,

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Appellees.

REPLY OF APPELLANTS TO BRIEF OF APPELLEES WINANS

On Appeal from the United States District Court for the District of Oregon.

HON. GUS J. SOLOMON, Judge.

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THE GENERAL THEORY OF THE WINANS' BRIEF

We must confess that we are puzzled by statements in the Winans' brief. One of these statements appears on page 24, as follows:

> "No Oregon cases have been found on the right of action for damages for intentional falsehood. . . ."

There are, of course, many Oregon cases in which plaintiffs have sought "damages for intentional falsehoods". Three of them are *Cooper v. Phipps,* 24 Or. 357, 33 P. 985, 986, 22 LRA 836; *McKinney v. Cooper,* 163 Or. 512, 98 P.2d 711; and *Strycker v. Levell and Peterson,* 183 Or. 59, 190 P.2d 922, all referred to in our original brief (pp. 74-6).

Another statement which, it seems to us, does not aid clarity of analysis is on page 14:

> "The Winans' cross-claim is not an action for slander . . . but is an action on the case."

With equal logic it could be said that it is not an action for slander but an action in tort. For the action of slander is itself one of the historic examples of "an action on the case". Townshend on Libel and Slander (4th ed.) 36; 2 Selwyn's Nisi Prius (7th Am. Ed.) 1045; 33 Am. Jur., Libel and Slander, sec. 224, p. 207; 53 CJS, Libel and Slander, sec. 152, p. 237.

But, counsel's protestations to the contrary notwithstanding, their brief clearly discloses, as did their pleadings, that what they are seeking is compensation for alleged slander. This not only appears from the frequent assertions that the statements "slandered the Winans" (p. 11) and "constituted slander" (p. 36), but also from the contents of three subdivisions of the brief labeled "Slander *per se*", (pp. 36-40), "Slander *per quod*", (pp. 40-1), and "Libel', (pp. 41-2).

Furthermore, even though it be regarded as an "action on the case" (in the sense in which that nomenclature seems to be used by Winans' attorneys) it is neces-

sary that, with respect to each alleged wrongful act included within the charges made, e.g., the alleged slander, the plaintiff prove his contention that there was an actionable wrong committed against him. *Condit v. Boddings,* 147 Or. 299, 326-8, 33 P.2d 240, 250-1. So that no matter how the case is viewed, if the Winans have no cause of action for slander, they have no case.

The New York case of *Al Raschid v. News Syndicate Co., Inc.,* 265 N.Y. 1, 191 N.E. 713, relied upon by the Winans (Br. 20-1), seemingly has introduced a novel offshoot of the law of libel and slander, a departure which seemingly has not been adopted in other states. Professor Prosser in a chapter on his work on torts, which he calls "Injurious Falsehood", includes this case among various others in a branch of the law often referred to as the Law of Disparagement (Prosser on Torts, sec. 106, pp. 1036-49). As he points out, this phase of the law "has variously been called 'disparagement of property', 'slander of goods', and 'trade libel' " (p. 1037). It applies to "statements injurious to the plaintiffs business but casting no reflection upon either his person or his property", but adds that the doctrine "has even been carried over to interference with prospective non-commercial advantage, such as the expectancy of a marriage, or the right to remain in the United States rather than be deported"—citing the *Al Raschid* case on this latter point (Id. p. 1037).

The rule of the *Al Raschid* case has been referred to in New York as one which applies "only if the false statements are not actionable as libels or slanders, either because they are non-defamatory or for other reasons."

Dubouneq v. Brouwer, 124 N.Y. Supp. 2d 61, aff'd 124 N.Y. Supp. 842. For this reason and also because the rules of privilege apply to these "injurious falsehood" or "disparagement" cases (Prosser on Torts, sec. 106, pp. 1045-7), it is difficult to understand how this novel rule of law either applies in this case, or if it does, how it aids the Winans.

PRIVILEGE

Much of the Winans' brief is devoted to an elaboration of the historical and philosophical background of the general rule of torts that intentional infliction of damages gives rise to a cause of action, that "every man shall have remedy by due course of law for injury done him in his person, property or reputation" (Br. 22-6). On page 19 there is a quotation from Restatement of Torts, sec. 873, setting forth the general rule that intentional false statements subject one to liability. But statements such as this are, as of course the Restatement recognizes, subject to qualifications—among others, the rules of privilege. As comment (a) of the section quoted (sec. 873) states, the rule of that section "overlaps the rules stated in other Sections of the Restatement of this subject". (See also sec. 10 and sec. 890, comment (d).)

In our first brief (pp. 74-5) we called attention to the Restatement of Torts, secs. 587, 588. The first of these sections lays down the rule that:

> "A party to a private litigation . . . is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, . . ."

Section 588 lays down the rule that a witness

> ". . . is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding. . . ."

And comment (b) of sec. 588 states that a witness has an absolute privilege

> ". . . while engaged in private conferences with an attorney at law with reference to proposed litigation."

These sections of the Restatement were quoted with approval, as we pointed out in our first brief (pp. 75-6), by the Oregon Supreme Court in *Strycker v. Levell and Peterson,* 183 Or. 59, 67-8, 190 P.2d 922, 925, but no reference is made to them in Winans' brief.

In this connection, we believe it important to bear in mind who the attorneys were with whom the Parkers were consulting when it is claimed they slandered Winans. Two of them, Marsh and Dashney, were Parkers' then attorneys, and the other two, Buell and Altstadt, represented the Company. Under the proposed agreement the Parkers themselves were to be the plaintiffs in a proposed suit against the Winans; and Buell's firm was to represent them in that suit, unless the Company designated other attorneys to do so (R. 1903, 1910). The conferences were for the purpose, among others, of determining the basis of the Parkers' proposed suit against the Winans. So the situation comes exactly within both the above rules of the Restatement, that the absolute privilege protects both a *party* and a *witness* "in communications preliminary to a proposed judicial proceeding."

Counsel cite, in opposing the claim of privilege, the New York Supplement case of *Schauder v. Weiss,* 88 N.Y. Supp. 2d 317, aff'd 276 App. Div. 967, 94 N.Y. Supp. 2d 748 (Br. 42-3). That case did not involve, as this case does, conferences with an attorney, either by a party or a witness, with respect to forthcoming litigation. A detective agency "made an alleged investigation of plaintiff's conduct and maliciously, falsely and fraudulently made a report . . . accusing plaintiff of committing adultery". The report of the case does not make it clear to whom the report was made, although there is some indication it was "to diverse persons". At any rate, *Strycker v. Levell,* supra, is the law of the state of Oregon, and to the extent that the New York case is in conflict with it, it must be disregarded.

The New York case just discussed, as will be seen from the quotation in the Winans' brief (pp. 42-3), adopts the "injurious falsehood" theory, discussed above. A New York case more in point, which also involves that novel rule of law, is *Lucci v. Engel,* 73 N.Y. Supp. 78. There, false statements were made in connection with adoption proceedings. The court pointed out that the statements were "not necessarily defamatory" and therefore the rules of libel did not apply. But, the court added:

> "The statements were, however, absolutely privileged since they were pertinent to the adoption proceeding in the Surrogate's Court and the same reasons that have led to the granting of an absolute privilege to pertinent statements made in the course of judicial proceedings in libel or slander actions, require a similar conclusion in the case of injurious falsehood based upon nondefamatory statements."

The Winans' brief attempts to make the point that the claim of privilege was not pleaded (pp. 45-6). (We assume that the statement, p. 45, that the claim of privilege "makes its first appearance in this case in their briefs" is not intended as a statement that counsel were not advised theretofore that a claim of privilege was asserted.) The further claim is also made that actually the communications to the Title Company's attorneys were not for the purpose of giving them information to be used in connection with the proposed action (p. 45).

Both of these contentions can largely be answered by reference to the Winans' cross-claim and to the evidence introduced by them. The cross-claim itself states that the statements made were made in anticipation of legal proceedings (R. 89-90); and *all* of the evidence upon which the claim of privilege was based (some of which is referred to above and more will be discussed presently) was introduced by the Winans themselves (R. 1769-1812).

In either of the above situations, affirmative pleading is not necessary. The case referred to above, *Strycker v. Levell and Peterson,* 183 Or. 59, 190 P.2d 922, was decided on demurrer to a complaint, there being no necessity for any affirmative pleading by the defendant since the complaint disclosed that the communications were privileged. It is also a rule with respect to these so-called affirmative defenses that if the plaintiff's own evidence shows, as it did here, that the defense exists, plaintiff is not entitled to prevail even though the matter has not been affirmatively pleaded by the defendant. *Adair, Admx. v. Valley Flying Service,* 196 Or. 479, 250 P.2d 104.

THE EVIDENCE OF SLANDER AND DAMAGES RESULTING THEREFROM

(a) *The alleged slander.* In attempting to prove that there was slander, the Winans' brief quotes from the testimony of attorney Buell that Parker stated in the conferences "that he did not know anything about any defect in the title until after the deed had been received and recorded", but that Parker also stated that on the one occasion when he talked to Winans "there was no dicussion between them as to the title". He also said that it was always "assumed that the Parkers had no knowledge of the defect" (Br. 27-8). On this latter point testimony of another attorney at the conferences is given, together with recitals in the various contracts that were tendered (p. 28).

Aside from this, the only evidence referred to in the brief is (1) that the Parkers "staged a show of surprise" when they saw the file of the Winans' negotiations for settlement on their title policy (p. 29), (2) a statement made in Parker's deposition that he remembered saying to somebody who was present at the meetings that Paul Winans had said that he had a good and marketable title, and (3) a notation by Parker in his diary (R. 2236) that "I told them I thought Winans thought they owned the property or they would not have gave me a deed for it" (Br. p. 39).

The facts, pointed out in our first brief, that both the Vice-President of the Title Company, a lawyer, and Buell, the attorney, said they could recall no representa-

tions in any of these conferences (App. Br. 80), that the Title Company had decided to sue Winans before they ever met the Parkers (p. 83), and that in drafting the charges against Winans "was relying primarily on the complaint the Title Company's attorney in making the option itself" as a "representation of marketable title" (p. 84), are all entirely disregarded in the Winans' brief.

(b) *Evidence of damages.* Likewise, the brief entirely disregards, what we also pointed out in our first brief, that the newspaper articles which caused Winans the most trouble were published *prior* to the filing of the action (Br. 88-9) and that at no place in the original complaint was there any charge that any of the Winans falsely represented anything to the Parkers (p. 84). They relegate to a footnote their references to this original complaint (Br. 41, n. 23); and a reading of the portions thereof there cited merely corroborates what we have already said, as just set forth.

"As to their reputation," the brief says, referring to the Winans (p. 48), the public had an "extreme public interest" in everything affecting the shores of Lost Lake, and accordingly "news articles dealing with the sale of the Winans' property on Lost Lake were widely read;". But what the brief ignores is that most of these articles were published *prior* to the filing of the complaint (R. 1925-8, 2274-6). But although Winans' brief states that (p. 49) "the charges against the Winans of falsely representing their property were widely discussed", at no place does it recognize the fact that not only, as already pointed out, did the complaint not charge that Winans had misrepresented the property to the Parkers, but

neither of the newspaper articles published *after* the filing of the complaint made any such charge (R. 1928-31, 2276-7). (See further, on this, our original br. pp. 84-90, ignored in the Winans' brief.)

The rest of the Winans' arguments regarding damages we believe are adequately covered in our first brief (pp. 86-94).

Respectfully submitted,

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PETITION OF APPELLEES WINANS FOR CLARIFICATION OF OPINION AND FOR REHEARING

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Appellant,

vs.

TITLE AND TRUST COMPANY, a corporation; PAUL WINANS, ETHEL WINANS, ROSS M. WINANS, AUDUBON WINANS and LINNAEOUS WINANS,
Appellees.

PETITION OF APPELLEES WINANS FOR CLARIFICATION OF OPINION AND FOR REHEARING

To *the HONORABLE WILLIAM DENMAN, Chief Judge, and HOMER T. BONE and WALTER L. POPE, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:*

Appellees Paul Winans, Ethel Winans, Ross M. Winans, Audubon Winans and Linnaeous Winans (hereafter "the Winans") respectfully petition for a clarifica-

tion of the opinion of this Court filed May 4, 1956, and for a rehearing of the judgment of this Court reversing the judgment below in favor of the Winans, on the grounds that:

(1) The opinion requires clarification to set forth that the only portion of the judgment below reversed is paragraph 6 thereof which awarded money damages to the Winans.

(2) Costs should not have been awarded against appellees Winans, who were otherwise successful in having the judgment below in their favor (except as to paragraph 6 thereof) affirmed by this Court.

(3) The Court erred in its determination of Oregon law as to absolute privilege as immunizing appellants' wrongful conduct, in that:

(a) This Court's determination is contrary to the recent decision of the Oregon Supreme Court in *Grubb v. Johnson,* 61 Ore. Ad. 563, 289 P. (2d) 1067, November 23, 1955.

(b) Appellants' conduct was not part of a "judicial proceeding" under Oregon law.

(c) Policy considerations in administration of justice in Oregon do not here justify invoking doctrine of absolute privilege.

(4) The Court erred in viewing absolute privilege as having any bearing on this case, inasmuch as the Winans were damaged as a direct result of appellants' scheme to defraud the title company.

I.

Clarification of Opinion Required as to Portion of Judgment Below to Be Reversed

The opinion of this Court states:

"The judgment is modified by striking therefrom the portion thereof in favor of the Winans and against the Parkers and Stegmann, and as so modified, the judgment is affirmed." (Slip Op., p. 18)

There were two portions of the judgment below in favor of the Winans and against the Parkers and Stegmann, namely, paragraphs 5 and 6 thereof, providing:

"5. That the counterclaims of defendants, Chet L. Parker, Lois M. Parker and Walter Stegmann, against third-party defendants be and they hereby are dismissed with prejudice."

"6. That the third-party defendants have judgment for and recover of and from defendants, Chet L. Parker, Lois M. Parker and Walter Stegmann the sum of $9,000.00, and that said third-party defendants have judgment for and recover of and from said defendants, Chet L. Parker, Lois M. Parker and Walter Stegmann, their costs and disbursements herein incurred, taxed in the sum of $ ..... ." (Tr. 149)

The opinion of this Court requires clarification to set forth that the only portion of the judgment reversed is paragraph 6 thereof (set out above) which awarded money damages to the Winans. Lest advantage be taken of this Court's language, the judgment of the Court should make clear that paragraph 5 (set out above) of the judgment, which dismissed the counter-claims of the Parkers and Stegmann against the Winans, is affirmed.

As the record shows, when Winans filed their cross-claim for damages against the Parkers and Stegmann (Tr. 83-92), Chet Parker, in turn, filed a counterclaim against the Winans seeking recovery over against them of $125,000.00 in the event his title insurance policies were canceled, his claim being "based upon the allegations of plaintiffs' complaint and of the counterclaim of defendant Chet L. Parker" (Tr. 94-95).

Appellant Stegmann also filed a cross-claim against the Winans seeking to recover over against them any judgment against him in favor of the Title and Trust Company and to recover $10,000 attorneys fees by reason of the Winans "intentionally failing to disclose to defendant Stegmann the claims of the United States Government to said real property."

The District Court, as noted above, dismissed these counterclaims of Parker and Stegmann, finding that full disclosure as to the defect in the title to Lot 2 had been made both to the Parkers and to Stegmann.

On this appeal, both Parker and Stegmann specified as error the dismissal of their claims against the Winans (Tr. 2290-2291 and Parker Br., p. 68; Tr. 2296-2297 and Stegmann Br. p. 10).

In its opinion, this Court has upheld the trial Court's findings of the disclosures made by the Winans and of the knowledge of the Parkers and Stegmann of the defect in the title to Lot 2. Such being the case, there is no basis for any claims by the Parkers and Stegmann against the Winans, and none have been suggested. Accordingly, we ask that this Court specifically clarify its opinion in the respect requested herein.

II.

Costs Should not Have Been Awarded Against the Otherwise Successful Appellees Winans

The opinion of this Court orders that the Winans pay one-tenth of the appellate costs of the Parkers and Stegmann, evidently because of the reversal here of the damage award in favor of the Winans.

Under the circumstances of this appeal and the Court's decision herein, we submit to the Court that costs should not have been awarded as between the Winans, on the one hand, and the Parkers and Stegmann on the other.

There was considerably more at stake in this appeal for the appellees Winans than their money judgment against the Parkers and Stegmann. The Title and Trust Company had filed a third party action against them seeking recovery over against them of any judgment which Parkers might obtain against it (Tr. 61-71). Likewise, as we previously pointed out, both Chet Parker and Stegmann filed claims against the Winans to recover over from them in the event the title company obtained a cancellation of its title insurance policy.

The results of this appeal are that the appellees Winans have been sustained in all respects, except as to their damage award. With the clarification heretofore requested in the Court's opinion, it will be made clear that the judgment in the Winan's favor against the Parkers and Stegmann on the cross-claims of the latter, is affirmed; and in the usual course of events such

affirmance under the rules of this Court would result in allowance of costs to the appellees Winans.

Costs, by their very nature being within the discretionary domain of this Court, we ask this Court in its redetermination of this matter to take into consideration the fact that the Winans were brought into this case and hence into this appeal by the wrongful and malicious conduct of the Parkers and Stegmann. Even if this Court sees fit to rule that the malicious conduct and activities of the Parkers and Stegmann was absolutely privileged insofar as the Winans obtaining a damage judgment against them is concerned, surely the appellate discretion of this Court will not burden the Winans with one more expense to which they must be put.

III.

The Court Erred in its Determination of Oregon Law as to Absolute Privilege as Immunizing Appellants' Wrongful Conduct

We believe it to be a fair statement that this Court has concluded (Slip Op. p. 15) that the Winans cannot recover the damages they suffered at the hands of the Parkers and Stegmann in this case, because the latters' conduct was "absolutely privileged" under Oregon law as laid down in *Strycker v. Levell*, 183 Or. 59, 190 P. (2d) 922 (1948).

As Oregon lawyers, we respectfully suggest to this Court that it is applying the doctrine of absolute privilege under circumstances that no court in Oregon ever has, and, in fact, that its application is not justified by

and runs contrary to Oregon law, as evidenced by the most recent absolute privilege case of the Oregon Supreme Court, *Grubb v. Johnson,* 61 Ore. Adv. 563, 289 P. (2d) 1067 (Nov. 23, 1955).[1]

Decision Herein Contrary to Recent Grubb Case

In the *Grubb* case, defendants wrote the Oregon Insurance Commissioner, directing him to revoke a license theretofore issued to the plaintiff to be an insurance solicitor for the defendants and stating that the plaintiff has misappropriated to his own use certain funds. As a result, the plaintiff brought a libel action against the defendants for filing false charges against him causing a revocation of his license and received a jury verdict for general and punitive damages.

On appeal, the defendants contended that their letter to the Insurance Commissioner was absolutely privileged. The Oregon Supreme Court rejected this defense and affirmed the judment and, in so doing, reviewed the entire line of Oregon cases dealing with absolute privilege, summarizing them as follows (289 P. (2d) at 1071):

> "The Oregon cases, with only two apparent exceptions to be later noted, have limited the doctrine of absolute privilege to cases falling within the following categories: Those which involve the publication of statements by a judge in the course of judicial proceedings (*Irwin v. Ashurst,* 158 Or. 61, 274 P2d 1127); pleadings or publications filed by an attorney in the course of litigation (*McKinney v.*

[1]The *Grubb* case was decided after the argument in the instant appeals.

Cooper, 163 Or. 512, 98 P2d 711); private litigants or private prosecutors or defendants in a criminal prosecution (*Strycker v. Levell and Peterson*, 183 Or 59, 190 P2d 922); allegations by a party in a divorce action (*Pitts v. King et al.*, 141 Or 23, 15 P2d 379, 472); testimony of a witness in court (*Cooper v. Phipps*, 24 Or 357, 33 P 985); pertinent statements by counsel in a judicial proceeding (*Irwin v. Ashurst*, supra)."

As a matter of fact, the Oregon court pointed out that even in cases involving pleadings in a judicial controversy or the testimony of witnesses in a judicial proceeding, the rule of absolute privilege has *not* always been adhered to in Oregon, stating (289 P. 2d 1071-1072):

"In *Pitts v. King et al.*, supra, it was said that the weight of authority is to the effect that defamatory matter in a pleading is privileged 'if pertinent and relevant to the issues and made in good faith for the purposes of the case.'

"In *Cooper v. Phipps*, supra, the Court recognized a conflict of authority and stated that some of the cases hold that if a witness 'abuse his privilege by making false statements, which he knew to be impertinent and immaterial, and not responsive to quetsions propounded to him, for the purposes of malicious defamation, he may, upon an affirmative showing to that effect, be held in damages for libel or slander'."

The court further held that no Oregon decision ever extended the doctrine of absolute privilege to any case like the one involved in the *Grubb* case, and stated (289 P. 2d at 1072):

". . . the inferences to be drawn from our decisions militate strongly against any such extension."

Three aspects of the *Grubb* case are particularly noteworthy.

First, the defendants endeavored to justify their libelous communication as part of a judicial or quasi judicial proceeding authorized by Oregon statutes for the revocation of a solicitor's license, but the Oregon court refused to so extend any concept of a quasi judicial proceeding. Similarly, in this case the Parkers and Stegmann have sought to justify their tortious conduct as made in connection with judicial proceedings, but as is set forth in more detail *infra,* there was even less of a judicial proceeding involved in the instant case than in the *Grubb* case.

Secondly, we call to this Court's particular attention the way the Oregon Supreme Court has epitomized the Oregon case of *Strycker v. Levell,* 183 Or 59, 190 P (2d) 922 (which this Court has relied upon in its opinion), as standing *only* for the proposition that absolute privilege in judicial proceedings will be accorded to "private litigants or private prosecutors or defendants in a criminal prosecution." The accuracy of this summary appears from the very facts of the *Strycker* case, where the Court accorded absolute privilege to allegedly defamatory statements made by the very parties to an already instituted and pending judicial proceeding.[2]

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[2]This Court, in expanding the scope of the *Strycke*r case, has pointed to the citation therein of Restatement, Torts, Volume 3, Sections 587, 588, emphasized the language therein of communications "preliminary to a proposed judicial proceeding." The citation to the Restatement by the Oregon court was relied upon in the *Strycker* case in "substantial support" of its decision; and, of course, the language "as a part of a judicial proceeding" in the quoted extract from the Restatement fitted the very facts of the *Strycker* case.

Thirdly, the *Grubb* case is significant in demonstrating that the Oregon Supreme Court is completely unwilling to extend the doctrine of absolute privilege and will construe it as narrowly as possible. Thus, the Oregon Court stated that "courts are unwilling to extend the doctrine of absolute privilege" (289 P. (2d) at 1071), and quoted with approval from Prosser, Torts, Section 95 that "absolute immunity has been confined to a very few situations where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives."

Defendants' Tortious Conduct was not part of a Judicial Proceeding under Oregon Law

To reach the conclusion that it has, this Court has taken the position that Parker's statements in dealing with the title company were made in connection with judicial proceedings, either as proposed parties to a lawsuit against the Winans or as prospective witnesses giving their expected testimony in support of a third party claim by the Title and Trust Company.[3]

Such a factual assumption is not borne out by the evidence in the record. The conferences between the

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[3]When this Court states "the third-party complaint was filed against the Winans by the title company and in its own name in line with this insistence of Parker (Slip Op. p. 14), it is misconstruing the evidence which shows that after the title company and Parker were unable to agree on a settlement of his claim, the title company became suspicious of the Parkers and, after conducting an investigation, filed its original complaint against them, charging the Parkers with knowledge of the title defect and failure to disclose the same (Tr. 2241). The original complaint that was filed by the title company was thus not the suit which this Court states the Parkers wanted the title company to file in is own name.

Title and Trust Company and the Parkers were held to settle the claim of loss which the Parkers had filed (Tr. 1839; Finding XLIII, Tr. 140). The various proposed agreements submitted by the title company to settle the Parkers' claim contained provisions for the subsequent prosecution of a suit against the Winans; but these agreements were never consummated and the title company became suspicious and refused to proceed any further.

To say that the false statements made by the appellants during these negotiations were communications preliminary to a proposed judicial proceeding goes way beyond Oregon law, for no Oregon decision has ever ruled on extending absolute privilege to persons not parties to an action who are maliciously responsible for the inclusion of defamatory material in a pleading.

The communications by the Parkers were not, in Lord Mansfield's classic language, made "in office", that is, they were not made in the character of a witness or litigant in the performance of a public duty. Instead, Parker's fraudulent communications were found by the District Court to be made in furtherance of the conspiracy between the Parkers and Stegmann to defraud the Title and Trust Company (Finding XLVI, Tr. 142).

Although Oregon law does not have a case squarely in point on the non-applicability of absolute privilege to the appellants' communications, the law of other common law jurisdictions does. We ask this Court to examine these cases in light of the status of Oregon law as enunciated in the *Grubb* case: *Laun v. Union Electric Co.*, 350 Mo. 572, 166 S. W. (2d) 1065 (1942); *Rice v.*

v. Coolidge, 121 Mass. 393 (1876); *Ewald v. Lane,* 104 F. (2d) 222 (DC DC, 1939); *Bigelow v. Brumley,* 138 Ohio St. 574, 37 N.E. (2d) 584 (1941); *Annotation,* 144 A.L.R. 633.

Policy Considerations in the Administration of Justice do not here Require the Doctrine of Absolute Privilege

All of us concerned with the administration of justice are in accord with the statement of this Court that:

> ". . . it is of fundamental importance in the administration of justice that witnesses and parties to suits should not be called to account in private suits for defamation . . . for what they have to say in connection with pending litigation. . ." (Slip Op., p. 17).

But such a laudible purpose finds no application in the present case. The policy upon which the rule of absolute privilege is founded can hardly be said to be effectuated by enabling persons engaged in a fraudulent scheme to enmesh others therein and then seek judicial sanctity on grounds that the administration of justice will be furthered by their being freely allowed to damage innocent persons.

The *Grubb* case shows that the Oregon Supreme Court as a policy matter will not extend instances of absolute privilege beyond the very limited instances noted by it. Certainly no one has yet suggested how extending the doctrine of absolute privilege to malicious schemers like Parkers and Stegmann will in any way cripple the wholesome policy of allowing witnesses "in office" to be absolutely privileged with respect to their relevant testimony.

IV.

The Court Erred in Viewing Absolute Privilege as Having any Bearing on this Case

We recognize that a petition for rehearing should not traverse well-plowed ground, but any reading of this Court's opinion indicates that this Court has failed to meet the main point made on the oral argument of this case before the Court, namely, that the doctrine of absolute privilege has no bearing or application in this case, inasmuch as the Winans were damaged as a direct result and as part and parcel of the appellants' scheme to defraud the Title and Trust Company.

Although appellants were represented by one of Oregon's most capable and illustrious attorneys, the first mention that ever appeared of privilege was in appellants' brief before this Court. Privilege was neither pleaded by the appellants nor ever presented to the District Court in the lengthy trial, briefing and arguments that took place below. This Court's ruling that it was unnecessary to plead privilege affirmatively (Slip Op., p. 16) should not obscure the fact that the Winnans' cross-claim was tried below on the basis that the Parkers and Stegmann engaged in a conspiracy to defraud the title company, which resulted in subsequent damage to the Winans.

Under the law of Oregon, as no doubt that under all other jurisdictions, tort feasors are liable for all of the reasonably foreseeable consequences of their conduct. *Gilman v. Burlingham,* 188 Or. 418, 423, 216 P.

(2d) 252, 255 (1950). That the Parkers and Stegmann were such tort feasors appears from the findings of the District Court that they "entered into a conspiracy" to defraud the Title and Trust Company, with which finding this Court has agreed. It was "pursuant to and in furtherance of the conspiracy between" the Parkers and Stegmann that the District Court found that the false representations were made to the title company, which thereafter resulted in the Winans being involved in this case with consequent damage to themselves.

In its reconsideration of this matter, we ask the Court to bear in mind that the Winans were used as necessary pawns by the Parkers and Stegmann to effectuate their scheme of defrauding the title company. When it came time to collect on the title policy these pawns had to be sacrificed with the sacrifice taking the form of falsely and maliciously misrepresenting the Winan's prior dealings with full knowledge of the ensuing damage which would thereafter be visited upon the Winans.

No cases have been cited by this Court that such conduct is absolutely privileged. Moreover, we dare say that there never could be any case which would grant an absolute privilege to a group of individuals to engage in a scheme to defraud a title company and as part of that scheme to make false and malicious representations concerning other innocent persons, as a result of which these persons are forced to defend a lawsuit in which their names and reputations are impugned and their businesses damaged.

CONCLUSION

For the reasons set forth above, we respectfully submit that the opinion of this Court should be clarified as requested herein and that this Court grant our petition for a rehearing of the judgment herein reversing the judgment of the Court below awarding money damages to the Winans.

Respectfully submitted,

KRAUSE, EVANS & LINDSAY,
GUNTHER F. KRAUSE,
DENNIS LINDSAY,
Attorneys for Appellees Winans
and Petitioner.

CERTIFICATE OF COUNSEL

IT IS HEREBY CERTIFIED that in the judgment of the undersigned, the foregoing petition is well-founded, and is not interposed for delay.

Dated at Portland, Oregon, June 1, 1956.

DENNIS LINDSAY,
Of Counsel for Appellees Winans
and Petitioner.

No. 14,216

IN THE

United States Court of Appeals

For the Ninth Circuit

ALDEN HANSEN,

Appellant,

vs.

SAFEWAY STORES, INCORPORATED, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,216

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ALDEN HANSEN,

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APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

Appellant's action was for patent infringement arising under Title 35, section 67 United States Code. It is an action on the case for damages for patent infringement.

Jurisdiction of the District Court is authorized by Title 28 United States Code, section 1338.

The jurisdiction of this Honorable Court to review the judgment rendered in the United States District Court is found in Title 28 United States Code, section 225.

ABSTRACT OF THE CASE.

This appeal is prosecuted after adverse judgment rendered by the trial Court pursuant to rule 50(b) of the rules of civil procedure. The jury failed to agree.

(Volume I, page 5.)

The sole question raised by this appeal goes to the propriety of the trial Court's granting defendant's motion for judgment as a matter of law.

In its memorandum for judgment (Volume I, page 54) the trial Court directed judgment for the defendant

> "* * * because plaintiff's patent is invalid for lack of novelty, lack of invention, or lack of both novelty and invention."

Of the great mass of alleged prior art and prior use introduced into evidence (of which only a small part was discussed at all), the Court did not indicate upon what alleged prior art or use, or otherwise, the decision was based.

Nor does the ultimate judgment of the trial Court reflect the direction in the memorandum for judgment, but states generally,

> "* * * that there was no evidence offered and received in said cause which would justify a verdict in favor of plaintiff and against said defendant, and that the evidence was legally insufficient to support a verdict in favor of plaintiff * * *"
>
> (Volume I, page 58, lines 19-22.)

Because of the sweeping language of the judgment, appellant conceives it his burden and duty to point out

substantial evidence sufficient to support a verdict in his favor, on every material issue. No other issues are raised by this appeal.

In appellant's outline of the factual background as revealed by the evidence, appellant will here endeavor to make a fair statement of the evidence, pointing out basic conflicts, where they exist, and drawing all favorable inferences where such may properly be drawn, as he is entitled to do in such a case.

Southern Pacific Company v. Souza, 179 F. (2d) 691 (9th Circuit).

FACTUAL STATEMENT.

In the early 1940's Alden Hansen, appellant-plaintiff, was employed by Safeway Stores, Incorporated, appellee-defendant. He worked, for the most part in the inventory control, and billing department. (Volume III, page 15, line 23 through page 16, line 4.)

His duties consisted of supervising a group of comptometer operators. (Volume III, page 284, lines 11-12.) His wages were approximately $240.00 per month. (Volume IV, page 479, lines 15-16.) He was so employed by Safeway for a period of approximately 12 to 14 years, not continuous. (Volume III, page 15, lines 9-21.) There was a period between 1932 and 1934 when he was not employed by Safeway, but he thereafter returned to them at their request. (Volume 3, page 15, lines 14-19.)

The primary function of the office and department in which Hansen worked was to receive and integrate the statistical information received from the individual stores of the San Francisco zone area which was then comprised of approximately 200 individual stores. (Volume III, page 20, line 10.)

The information was received from the individual stores on invoices from which it was laboriously transcribed onto various manifests and forms then in use by Safeway. It was thereafter recapitulated as the records of the Safeway demanded to yield the desired information. (Volume 3, page 20, line 10.)

While working in this department Hansen noted that the system was both cumbersome and inefficient. It required more copy work than was necessary and was highly susceptible to error, particularly in view of the great amount of copy work wherein each step entailed substantial risk of error, both in the correct transcription of figures, as well as further risk of error in the placing correct figures on the correct column and page. (Volume III, page 16, line 11 through page 17, line 12.)

Hansen approached his superiors, a Mr. Mead, an auditor, and two office managers, Martin McCarthy and Oscar Witt, with the idea of working out a more efficient system. However, he was told "that all a statistical fellow would have to do would be to follow procedures as outlined by the general offices." (Volume IV, page 479, line 24 to page 480, line 13.)

Hansen did not abandon his idea and, on his own time, he worked out the business records invention which forms the basis of his patent and for which he ultimately received letters patent on June 18, 1946. (Plaintiff's Exhibit 1.)

After Hansen had perfected his invention he again approached his superior (Clarence Cambridge, office manager for San Francisco zone area) with the idea in rough form, worked out but not printed. Safeway then recognized the merits and possibilities of the invention and accepted it on a trial basis in the San Francisco zone office. It was there installed during June of 1942. It was thereafter expended to other zone areas of the Safeway from time to time. Safeway admitted by stipulation that it used forms substantially identical to plaintiff's exhibit 2 in the following zone areas between the following dates:

San Francisco, June of 1942 to March of 1947.

Fresno, California, May 1943 to June 1949.

Butte, Montana, October 1943 to September 1949.

Dallas, Texas, January 1945 to March 1950.

El Paso, Texas, January 1942 to June 1949.

Oklahoma City, January 1943 to January 1949.

Phoenix, Arizona, July 1943 to December 1949.

Salt Lake City, unknown date in 1942 and still in use December 17, 1952.

Omaha, Nebraska, September 1942 to December 1948.

Spokane, Washington, June 1943 to December 1948.

Seattle, Washington, October 1941 to December 1946.

Tulsa, Oklahoma, September 1942 to December 1948.

New York, July 1942 to December 1950.

The dates on the foregoing admission as read in the record vary slightly from the written stipulation on the same point which is also a part of the record, Volume 1, page 3.

The value to Safeway of the Hansen invention was hotly disputed. However, Hansen testified that his invention saved Safeway approximately $5.00 per store, per month. Plaintiff's exhibit 3 shows the number of stores in the total affected areas during the period of use of the Hansen invention. The total savings was approximately $350,000.00. Hansen further testified that reasonable compensation to him would have been one-fifth of what his invention saved Safeway. (One dollar, per store, per month.) (Volume IV, page 479, line 2.)

Hansen, at all times, expected compensation for his invention, and he so gave Safeway to understand. (Volume III, page 133, line 5, through page 135, line 8.) (Statement of inference on balance of last line stricken.)

Hansen's claim to compensation in excess of his regular wages was also denied by Safeway.

Hansen's invention was installed in the San Francisco zone office of the Safeway in June of 1942. On

December 14, 1942, he applied for letters patent. His application had a long history and the letters were not granted until June 18, 1946. In the interim the denial of his letters patent by the patent office and intermediate administrative authorities, was appealed to the United States Court of Customs and Patent Appeals where, by opinion of Presiding Judge, the Honorable Finis J. Garrett, the Court held the patent valid and ordered it to issue. (*In re Hansen,* 154 Federal (2d) 684.)

Meanwhile, Hansen continued his efforts to secure remuneration from Safeway for his invention and improvement and, on July 21, 1943, while he was still employed by Safeway, he wrote to Mr. Lingan A. Warren, who was then and, at the time of trial, was president of Safeway, reminding him of Safeway's commitment to compensate Hansen if his invention proved of value. (Plaintiff's Exhibit 5.)

Safeway made no written reply to this letter. However, Mr. Lou Cook, then San Francisco zone manager for Safeway, called Hansen into his office and, without stating his (Cook's) position on compensation one way or the other, attempted to "sound out" Hansen on whether he intended to sue Safeway. (Volume IV, page 481, line 19 through page 492, line 15.) Mr. Cook committed himself neither way on Safeway's position in the matter.

Nothing further was done and Safeway continued to use the Hansen patent until about the time when Hansen, through counsel, began to make demands

upon Safeway again (stipulated to be December 15, 1948. (Volume IV, page 500, line 18 through page 501, line 16.)

THE INVENTION.

The Hansen patent is simple. Instead of attempting to avoid error by forcing the human element, it contemplates and accepts it, and attacks the problem from the rear by laying the foundation for discovering and correcting error with great ease.

It is, perhaps best described by language of the United States Court of Customs and Patent Appeals which adopted language from appellant's brief before that Court:

"'* * * the structure embraces four elements alleged to be basic, viz.: '* * * (1) a foundation form having columns, (2) indicia on said foundation form identifying such columns, (3) strips attachable in the columns of the foundation form in a manner to leave the column indicia exposed, and (4) corresponding or matching indicia on such strips.'

"The brief further alleges that 'The absence of any one of the basic elements divests the invention of its identity,' and 'This is important from the viewpoint of the prior Art' * * *"

(There follows a discussion of the refinement features.)

In re Hansen, 154 Federal (2d) 684.

SPECIFICATION OF ERROR.

THE TRIAL COURT ERRED IN DECIDING THE CASE AS A MATTER OF LAW PURSUANT TO RULE 50(b) AND FORECLOSING JURY CONSIDERATION THEREOF.

IF THERE IS ANY EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT RENDERED, OR WHICH MIGHT BE RENDERED OF SUFFICIENT PROBABILITY AS WOULD ALLOW REASONABLE MINDS TO DIFFER ON THE QUESTION, THE MATTER IS FOR THE JURY TO DECIDE.

No proposition of law is more clearly defined, nor more often reiterated than the rule governing nonsuits, directed verdicts, and judgments notwithstanding the verdict.

> "* * * It may be granted *only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence,* the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given * * *"
>
> *In re Flood's Estate,* 17 Cal. (2d) 763, 768, 21 Pac. (2d) 579, 580.

The jury's verdict is final on questions of fact.

Southern Pacific Company v. Souza, 179 F. (2d) 691;

Chrissinger v. Southern Pacific Company, 169 Cal. 619, 149 P. 175;

Crawford v. Southern Pacific Company, 3 Cal. (2d) 427, 429, 45 P. (2d) 183, 184;

(Both cited with approbation in footnotes to *Southern Pacific Company v. Souza,* 179 F. (2d) 691.)

Conflicting evidence is for the jury and not for the Court on motion for directed verdict.

Evidence on motion for directed verdict must be taken in the light most favorable to plaintiff.

Knott Corporation v. Furman, 163 F. (2d) 199, 207.

THE SCOPE OF EVIDENCE TO BE REVIEWED.

SINCE THE TRIAL COURT, BY ITS JUDGMENT, DID NOT SPECIFY THE BASIS FOR ITS RULING, APPELLANT HERE CONCEIVES IT HIS BURDEN ON THIS APPEAL TO POINT OUT TO THIS HONORABLE COURT SUBSTANTIAL EVIDENCE ON EVERY MATERIAL ISSUE OF SUFFICIENT PROBABILITY AND REASONABLENESS TO JUSTIFY AND SUPPORT A VERDICT FOR PLAINTIFF BELOW HAD SUCH BEEN RENDERED.

If the constitutional requirements and safeguards of trial by jury are to be preserved, it is important most carefully to scrutinize judgments which propose to take an issue of fact from the jury upon grounds that reasonable minds could not differ on the point and it has, thereby, become a question of law for the Court to decide. Inroads are dangerous.

It may be well for a trial judge, either when acting as trier of the fact, or deciding a motion for new trial, to say, "If it were for *me* to decide, I would decide for the defendant." It is quite another proposition to say, speaking for all reasonable persons, "Not

only would I decide for defendant, but *no reasonable person could do otherwise.*"

THE ESSENTIAL EVIDENCE.

Appellant here lists first what he conceives to be undisputed evidence. Evidence upon which there was substantial conflict will be discussed in more detail later.

No effort is here made to discuss *all* the evidence, favorable or otherwise as that would necessarily entail a complete restatement of the entire transcript (504 pages) in addition to appellant's comments thereon. Appellant's purpose is here merely to show that there is substantial evidence on every material issue sufficient to support a verdict in his favor. The issues will be taken up, as far as possible, in the approximate order in which they appear in the allegations of the complaint, followed by the affirmative defenses of the answer.

(1) Patent number 2,402,282 (Plaintiff's Exhibit 1), was duly issued to plaintiff and he is now, and at all times, has been the owner thereof. (Transcript of Record, Volume 3, page 2, lines 17-22.) (The question of shop right and whether Hansen developed his invention as a part of his duties as an employee of Safeway will be discussed later in this brief.)

(2) Safeway used forms "substantially identical" to Plaintiff's Exhibit 2, which are the actual forms

used in the Hansen patent application and correspond exactly with the patent itself.

(3) Hansen never made, sold, or licensed any other person to use his patent invention. (Transcript, Vol. III, page 21, lines 1-9.)

Constructive notice of the existence of all patents goes to all the world. Special notice is required *only* when patentee manufactures or vends without so indicating on the product.

> *Wine Railway Appliance Company v. Enterprise Railway Equipment Company,* 297 U.S. 387, 80 L. Ed. 736.

The rule has been uniformly followed in *Sontag Chain Stores Co., Ltd. v. National Nut Company of California,* 310 U.S. 281, 84 L.Ed. 1204, 1212.

DAMAGES.

The measure of damages is

> "* * * due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, * * *"
>
> 35 U.S.C. 70.

Determination of the proper measure of damages consisted of fixing a reasonable royalty for the use Safeway made of the Hansen invention from the time the patent issued until it was discontinued by Safeway. As appellant has previously stated in his factual summary, the issue was contested by Safeway.

Hansen testified that his invention saved the Safeway approximately $5.00 per store, per month and that a reasonable royalty for such use would have been approximately $1.00 per store per month (one-fifth of what his invention saved Safeway); (Transcript Vol. IV, page 479, line 2).

Witnesses for Safeway testified, on the contrary, that the Hansen invention was of no value. (Defendant's Exhibit AL.) Defendant's exhibit AL, purporting to be an office memo from Arthur Stewart, comptroller to Lingen A. Warren, president, dated July 26, 1943, states that

> "* * * We cannot figure that there is any savings on the form as the number of persons employed had not decreased. In fact, it may have increased. * * *" (391/6-9.)

(The letter above referred to (Defendant's Exhibit AL) states many other facts of a most self-serving nature to Safeway. The original was signed only with typewritten initials "AS".

We ask your Honors to note that it was *after* the date of the foregoing letter which denied the value of the Hansen invention that Safeway further expanded the use of the Hansen forms to the Butte, Montana zone (October 1943) and to the Dallas, Texas zone in January 1945. (Volume I, page 3.) The *most* that can be said of the Safeway denial of value is that it merely raises a conflict in the evidence.

Indeed, plaintiff endeavored to elicit from Mr. Warren what *he* would consider a reasonable royalty for the use of any product, tangible, or otherwise, which would be of saving to Safeway. This effort was totally unsuccessful. The witness refused to respond directly. (Transcript Vol. IV, page 408, line 3 through page 408, line 8.)

Safeway also produced an expert witness on the value of forms (Mr. Victor Thomas) whose testimony, although not directly related to the type of licensing, was also adverse to the amount of plaintiff's claim.

ISSUES RAISED BY DEFENDANT'S ANSWER.

After denying the affirmative allegations of plaintiff's complaint (the evidence in support whereof has been heretofore discussed in this brief), Safeway raised a number of affirmative defenses. They are here taken up in the order in which raised. In discussing these issues the same policy will be adhered to as in the previous issues discussed.

Paragraph 5 of defendant's answer (Volume I, page 10) sets forth 24 alleged prior art patents including one British unpatented application. Of these, the great majority were introduced in evidence in a group as one exhibit (Defendant's Exhibit AM) in a book without further comment thereon.

To the end that the Court's time will not be wasted by deep analysis of a large mass of alleged prior art

which, although pleaded, was not actually urged at the trial, appellant here conceives it his duty to permit appellee to demonstrate to this Court what it conceives to be the basis of its defense of lack of novelty and invention.

Appellant respectfully suggests that it is incumbent upon appellee not only in the lower Court, but in this Court as well, to point out where it contends that its claimed prior art and prior use invalidates the Hansen patent.

Were the rule otherwise, all efforts to correct error on appeal in this type of case could easily be avoided merely by citing such great multitudes of alleged prior art, with copies perfunctorily introduced into evidence. The ultimate result would be that a complete analysis thereof before this Court would be impossible unless the Court were to dedicate itself exclusively to such a case. No litigant is entitled so to presume upon the Court's time.

Appellant here will discuss the patents actually urged by Safeway at the trial and on Safeway's motion for judgment under rule 50(b). Before doing so, however, it may be well to reiterate certain basic rules governing patents, particularly those which concern the particular facts of this appeal:

The Court's attention is first respectfully invited to the fact that this is not the ordinary case of patent infringement. Here Safeway first received the basic idea by means of a confidential disclosure and *then,*

when called to account for its use thereof and unjust enrichment, took the position that the idea was not novel; was not useful; was not used; that it had the right to use it; that it did not use it; that it was not the invention of the patentee.

Safeway received from Hansen the essence of his invention and it installed it, as such, in its San Francisco zone office, whereafter, after trial, it was extended and expanded to a total of thirteen zone areas of the Safeway. A sound and prudent line of decisions looks with justifiable suspicion upon an alleged infringer who, after such confidential disclosure, raises such defenses. We believe your Honors will agree that the sound precepts of *Hoeltke v. C. M. Kemp Mfg. Co.,* 80 F. (2d) 912, 923, are most appropriate to the facts of this case:

> "* * * where an unpatented device, * * * is set up as a complete anticipation * * * the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt. * * * And we think the same rule should be applied against one who admittedly receives a disclosure from an inventor, proceeds thereafter to manufacture articles of similar character, and, when called to account, makes answer that he was using his own ideas and not the ideas imparted to him. * * *"

Simplicity alone will not preclude invention.

Patterson-Ballagh Corp. et al. v. Moss et al., 201 F. (2d) 403, (9th Circuit).

Among the patents actually urged as prior art, and anticipation, including one unpatented device, the

majority were almost entirely unrelated. However, having been so raised they will be discussed but solely to point out sufficient differences to justify the conclusion that any questions were merely questions of fact and properly the province of the jury.

In support of its motion for judgment under rule 50(b) Safeway considered three patents, and two alleged prior uses. They are:

The Iseri Patent, number 1,271,167. (Defendant's Exhibits AG, AH and AI.)

The Graham Patent, number 1,442,266. (Defendant's Exhibit AE.)

The Bach Patent, number 758,808. (Exhibit AF.)

The Pontiac Prior Use. (Defendant's Exhibits Q, R, S, and AJ.)

The Safeway's Prior Use. (Defendant's Exhibit U.)

Appellant here takes up the alleged prior art and anticipation in the same order as here listed:

THE ISERI PATENT.

The Iseri patent does not have matching indicia to indicate proper (or improper) columns. (It has the strips labeled to correspond with the sheet for which they are intended.) It does not contain (1) the plurality of columns; (2) indicia on said foundation form *identifying such columns;* (3) plurality of strips applicable to the columns of the foundation form and effectively shorter than such columns; and (4) matching indicia on the foundation form and strips. (The Iseri patent provides for the name of

the bookkeeping record on all transferred strips so that they will be affixed to the correct record.) The rest of the Hansen combination invention, they do not have.

Safeway produced an expert witness to testify. However, upon cross-examination, his background on bookkeeping forms was revealed to be somewhat lacking. We ask your Honors to note not only his admissions of what differences actually existed between the Hansen patent and the Iseri patent, but also to consider the difficulty with which he must have been handicapped in making his analysis in the light of his background in the particular field of patents in question (transcript Volume IV, page 463, *et seq.*):

"Q. What is the difference between a ledger and a journal?

A. I don't know.

Q. You don't know? What is this called, Mr. Lothrop?

A. That is one of the——

Q. (Interposing) What is a daily balance book?

A. I don't know. I am not a bookkeeper at all.

Q. You are not an expert on bookkeeping form at all, are you?

A. I said I wasn't a bookkeeper.

Q. Are you an expert on bookkeeping forms?

A. I don't know.

Q. Are you claiming to be here?

A. I am claiming, I think, to be an expert on the showing in the various patents which are involved here, and insofar as they show bookkeep-

ing forms, I think I have studied these reasonably well and am thoroughly familiar with them.

Q. But you don't know the difference between a ledger and a journal?

A. No, I don't, I don't think that makes any particular difference.

Q. As a matter of fact you testified your entire background is not in this type of work at all, but is engineering?

A. By 'this type of work' do you mean with respect to bookkeeping or do you mean with respect to patents * * *"

It may be worthy of note that this same expert testified that the patent offices assigned specialists to the analysis of the patent applications presented. (transcript volume IV, page 308, line 22-page 309, line 2.)

The Graham patent, heavily relied upon by Safeway, contains no matching indicia with gummed strips. It is based upon a principal of overlapping pages whereby the proper columns are reached if the forms are properly applied. It does not appear to contain the matching indicia left exposed after application of the strips to the foundation form. (This fact does not appear from the blown up exhibit of Safeway (defendant's exhibit AE) but is readily noted from an examination of the actual patent which is among the patents introduced by Safeway as one exhibit (defendant's AM).)

THE BACH PATENT.

The Bach patent, even with the strained construction which no jury need draw, and which is not claimed by the author (it is alleged to contain "gummed strips" referred to by the inventor as "perforated squares"), is not designed, nor capable of being used, as is plaintiff's invention. The nearest resemblance is to be found in what might be considered the "matching indicia." It was not conceived, nor used, nor capable of being used as is plaintiff's invention. No reasonable construction of it (including the author's own) contains any "gummed strips." It is a coupon book—no more, no less.

In regard to the Bach patent, the language of *Bianchi v. Bianchi,* 168 F.(2d) 793, (9th Circuit), at page 803 again becomes appropriate:

> "* * * In determining the question of infringement, the court is not to judge about similarities or differences by the names of things, but is to look at the machine or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it. * * * One does not escape infringement by providing a single element which fully responds to a plurality of elements in the patent."

THE PONTIAC PRIOR USE.

The Pontiac alleged prior use (Exhibits Q, R, S, and AJ) contains no matching indicia and, rather than anticipating the Hansen patent, illustrates graphically the need for it. We again call Your

Honor's attention to the cross-examination of the expert witness of Safeway on the point. (Transcript Vol. IV, page 432, line 17-433/2, referring to defendant's exhibits R and S.)

"Mr. Bortin. Q. The teachings of this invention does not help in any way in locating errors once made?

A. Not that I know of, I couldn't say.

Q. The plaintiff's invention. The plaintiff's invention does, however, doesn't it?

A. I think it could, yes.

Q. Well, as a matter of fact, it does definitely; there is no question about it, is there?

A. I have never worked the plaintiff's alleged invention. I assume it works the way it says in the patent; I think that is right."

SAFEWAY'S OWN ALLEGED PRIOR USE.

The Safeway's own alleged prior use (defendant's exhibit U), is utterly foreign to the teachings of the Hansen patent. It consisted of no more than pasting sheets in a book after the information had been accumulated thereon. On cross-examination the Safeway's own officer and witness stated at Vol. III, page 253, lines 2-5):

"Q. Yes, there are columns there. The only relationship is the fact that you use glue and the fact that you use columns?

A. *Yes.*"

* * * * * * *

Of the patents relied on by Safeway, none cover the four basic elements *in combination* which form

the essence of the Hansen patent. The foregoing analysis was made merely to show that the Hansen invention differs materially and substantially from the prior art proposed by Safeway.

A patent that teaches merely an improvement in a familiar process merits a reasonably liberal construction.

> *Bianchi v. Bianchi,* 168 F. (2d) 793 (9th Circuit).

Of all the language which is most fitting in regard to inventions, appellant submits that it is that of *Diamond Rubber Co. v. Consolidated Rubber Tire Company,* 220 U.S. 428, extended and quoted with approbation in *Patterson-Ballagh Corp. v. Moss,* 201 F(2) 403 at page 406:

> "* * * It is quite apparent that simplicity alone will not preclude invention. Hindsight tends to color the seeming obviousness of that which in fact is true contribution to prior art. 'Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention.' "

Safeway referred to one other patent which was originally cited by the patent office but was not referred to in the opinion of the United States Court of Customs and Patent Appeals. This was the Groby patent, number 1,461,757.

Safeway's expert witness testified that this patent had "gotten lost along the way somewhere." (Transcript Vol. IV, page 323, lines 10-11.) He immediately admitted he did not know what happened to it. (Transcript Vol. IV, page 323, lines 14-18.)

The Groby patent was not urged in Safeway's motion for judgment under rule 50(b). This is not surprising in view of the admission of defendant's expert. (Vol. III, page 421, lines 12 through 19.) The Groby patent contains no matching indicia.

Safeway took the position throughout that the alleged prior art patents had been overlooked by the patent office.

We respectfully call to Your Honors' attention the language of *Artmoore Co. v. Dayless Mfg. Co.,* 208 F. (2d) 1, which states, in part:

> "* * * It has been held, and we think with logic, that it is as reasonable to conclude that a prior art patent not cited was considered and cast aside because not pertinent, as to conclude that it was inadvertently overlooked."

The above cited case further sagely states:

> "It is unrealistic to reason that Rogers did nothing more than might be expected of the skilled mechanic, when neither the owners of such prior art patents nor any member of the public after their expiration discovered that their teachings were worth reducing to practice."

Following its contention of prior art and anticipation, Safeway next urged (Vol. I, page 13, lines 21-24), that the Hansen invention was not practical and therefore without utility.

On this question, the evidence has already been reviewed in this brief. The invention was installed on a trial basis in San Francisco, and thereafter expended from time to time throughout the country. (Transcript, Vol. III, page 137, line 20 through 139/4.)

Next in order (Vol. I, page 13, line 25-page 14, line 3), Safeway contends that a business record system is not properly the subject matter of protection under the United States Patent Laws.

We respectfully submit to your Honors that the rule of *stare decisis* should apply, and the opinion of the United States Court of Customs and Patent Appeals should control on the point.

Paragraph 6 of defendant's answer denies infringing use. On this point the evidence has already been discussed, particularly with reference to the admissions of Safeway. (Vol. III, page 137/18 and following.)

Paragraph 7 (Vol. I, page 14, lines 9-13) of defendant's answer admits the use of the forms which are stipulated to be "substantially identical" to those upon which the Hansen patent is based. (Plaintiff's exhibits 1 (the patent) and 2 (the forms admittedly used by Safeway).)

Paragraph 8 of defendant's answer (Vol. I, page 14, line 18 through page 15, line 6) "admits" the use of non-infringing forms.

This paragraph does not deny the use of the Hansen forms as elsewhere admitted in substance by Safeway.

Paragraph 9 (Vol. I, page 15, lines 7-19) raises the affirmative defense of shop right. The facts regarding this defense have been discussed:

Mr. Cambridge, the office manager for the San Francisco zone office, admitted on cross-examination that Hansen had his invention in rough form and that all the Safeway did was to pay for the printing of the forms *it used in its own business.* (Vol. IV, page 299, lines 3-20):

> "Mr. Bortin. Q. Now, may I ask you one more question, Mr. Cambridge? Isn't it a fact that when you first saw Mr. Hansen's idea or patent it was in final form?
>
> A. No.
>
> Q. You deny that?
>
> A. I deny that. *We had to do a lot of printing.*
>
> Q. You did the printing?
>
> A. We did the printing later.
>
> Q. I am talking about the idea. The thought was worked out?
>
> A. The idea was worked out, yes, a rough drawing.
>
> Q. Yes.
>
> A. That's right.
>
> Q. You did the printing and you paid for the printing?

A. Yes.

Q. But the forms you printed you used for Safeway, didn't you?

A. Yes.

The law regarding license and shop right is ably expounded in *Barton v. Nevada Consolidated Copper Co.,* 71 F. (2d) 381, from which it appears that Safeway had neither shop right nor license.

Paragraph 10 of defendant's answer (Vol. I, page 15, line 20) denies that Hansen is entitled to damages prior to the issuance of the patent. With this contention, appellant has no quarrel.

CONCLUSION.

Upon every issue raised, either by general issue, or affirmative defense, the very most that can be said for appellee is that issues of fact only are raised.

We respectfully submit to your Honors that under such circumstances, the decision was for the jury, and the judgment rendered should be reversed with directions to the District Court to grant a new trial.

Dated, San Francisco, California,
July 14, 1954.

Respectfully submitted,
JOSEPH L. BORTIN,
Attorney for Appellant.

No. 14,216

IN THE

United States Court of Appeals

For the Ninth Circuit

ALDEN HANSEN,
Plaintiff-Appellant,

vs.

SAFEWAY STORES, INCORPORATED,
a corporation,
Defendant-Appellee.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE SAFEWAY STORES, INCORPORATED.

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BRIEF ON BEHALF OF DEFENDANT-APPELLEE SAFEWAY STORES, INCORPORATED.

I. INTRODUCTION.

In this brief, appellee will depart from the conventional form of an appellee's brief because appellant's opening brief, we believe, fails to set forth the case in the proper perspective and, therefore, requires that appellee not only present its case but correct the errors and supply the omissions of appellant. Therefore, in this brief, appellee will present the full scope of the case before this Court.

II. ABSTRACT OF THE PLEADINGS.

The complaint (V. I, p. 1)* alleged that appellee infringed appellant's patent and that appellant was damaged in the amount of $750,000. A jury trial was demanded. In its amended answer (V. I, p. 10) appellee denied the allegations of the complaint and pleaded (1) that the patent in suit was invalid, (2) that the patent was not infringed, (3) that appellee had a shop right, (4) that appellee had a statutory license and (5) that appellant had not been damaged. Appellee agreed (V.I, p. 3) that it had used forms substantially identical to certain forms (which were attached to that stipulation) in its business in certain places and between certain dates.

In the answers to interrogatories propounded by appellee (V. I, p. 21) appellant indicated that he would claim at the trial (1) a breach of a confidential relationship between the parties, (2) that appellee agreed to pay to him reasonable compensation if the invention proved to be of value to appellee, and (3) that appellee breached this contract. These claims were quickly disposed of in a pre-trial order (V. I, p. 25) in which the trial court ordered:

> "That the only issues to be tried in this matter are whether the claims of the Hansen patent in suit are valid or invalid and whether the business records of the defendant infringe or do not infringe a valid claim, if any, of said patent."

---

*All references to the transcript will be to volume and page, i.e., (V. ..., p. ...) and references to plaintiff's and defendant's exhibits shall be (P. Ex. ...) and (D. Ex. ...).

The case was tried before a jury and at the conclusion of the evidence, the scope of which will more fully hereinafter be outlined, appellee moved for a directed verdict. (V. I, p. 26.) Ruling on that motion was reserved under the provisions of Rule 50(b) of the Federal Rules of Civil Procedure until after the jury should have passed upon the evidence. The cause was submitted to the jury under proper instructions, and the jury retired. After nine hours of deliberation, the foreman of the jury advised the court that the jury was unable to agree upon a verdict and the Honorable Court thereupon discharged the jury. (V. IV, p. 568.)

Within ten days after the jury was discharged appellee moved for judgment in accordance with its motion for a directed verdict. (V. I, p. 29.) The grounds of said motion were (1) that the patent in suit was invalid because it did not define invention over the prior art as exemplified by certain prior uses and certain patents and did not reveal a flash of creative genius but merely the skill of the calling, (2) that appellee's business records did not infringe, (3) that appellee was possessed of a statutory license, (4) that appellee was possessed of a shop right, and (5) that appellant had failed to prove that he had been damaged. (V. I, 29.)

The judgment of the court (V. I, p. 58) states in part:

> "The court having considered the evidence and the law finds as a matter of law that there was no evidence offered and received in said cause

which would justify a verdict in favor of plaintiff and against said defendant, and that the evidence was legally insufficient to support a verdict in favor of plaintiff, and having directed entry of judgment in favor of defendant in accordance with said motion,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff take nothing; that the action be and it is hereby dismissed on the merits with prejudice; that defendant have and recover from plaintiff its costs in the action and that defendant have execution therefor."

and it is from this judgment that appellant has appealed.

III. SPECIFICATION OF ERRORS BY PLAINTIFF-APPELLANT.

The rules of this Court provide that appellant must clearly set forth in his brief the specification of errors upon which he relies. Appellant purports to do so on page 9 of his brief, as follows:

"The trial court erred in deciding the case as a matter of law pursuant to Rule 50(b) and foreclosing jury consideration thereof."

"If there is any evidence to support the verdict rendered, or which might be rendered of sufficient probability as would allow reasonable minds to differ on the question, the matter is for the jury to decide."

As previously pointed out, appellee made a motion for a directed verdict at the conclusion of the testi-

mony. The learned trial judge neither granted nor denied the motion at that time but reserved ruling on the motion until after the jury had passed upon the evidence. (V. I, p. 58, lines 7 to 11 inclusive.)

The cause was submitted to the jury, but the jury failed to agree upon a verdict and was discharged. Thereafter, within ten days after said jury was discharged, appellee made a motion for judgment in accordance with motion for a directed verdict. The Court considered the evidence and found as a matter of law that there was no evidence offered and received in said cause which would justify a verdict in favor of the appellant and directed a verdict for the appellee. (V. I, p. 58.)

Appellee submits that it was proper for the learned trial judge in considering appellee's motion to analyze the evidence and find that there was no substantial evidence which would justify a verdict in favor of appellant and then rule upon the questions of validity, infringement, shop right, statutory license, and damages, all of which were properly raised by appellee's motion.

IV. THE TRIAL JUDGE HAS A RIGHT TO DIRECT A VERDICT WHERE NO VERDICT IS RETURNED.

At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make

such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as nonsuiting the plaintiff where he had obtained a verdict, or making other essential adjustments. *Baltimore and Carolina Line v. Redman* (1935), 295 U.S. 654, 79 L.Ed. 1636.

This practice was undoubtedly well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment. *Baltimore and Carolina Line v. Redman, supra; Galloway v. United States* (1943), 319 U.S. 372, 63 S.C. 1077.

Rule 50(b) of the F.R.C.P. specifically codified this and also states that if no verdict is returned, the Court may direct the entry of judgment as if the requested verdict had been directed.

The Courts have uniformly held under this rule that where the jury fails to agree that the appellee has a right to move for a directed verdict. *Fletcher v. Agar Mfg. Corp.* (D.C. W.D. Mo., 1942), 45 F. Supp. 650; *Willis v. Pennsylvania R. Co.* (C.C.A. 2, 1941), 122 F. 2d 248; *Renault v. L. N. Renault & Sons, Inc.* (D.C. E.D. Pa., 1950), 90 F. Supp. 630. In considering such a motion the Court must decide whether or not there is any substantial evidence, upon which the jury could find for the appellant [see *Blue Bird Taxi Corp. v. American*

Fidelity & Casualty Co. (D.C. E.D. S.C., 1939), 26 F. Supp. 808] and where the evidence is undisputed the court must determine its effect as a matter of law. *Renault v. L. N. Renault & Sons, supra.*

In general, appellee's motion should be considered to be analogous to a motion for a directed verdict after the close of the evidence or a motion for a judgment notwithstanding the verdict. The pertinent patent cases involving these analogous motions are discussed below.

V. THE TRIAL JUDGE HAS A RIGHT TO DIRECT A VERDICT OR ENTER A JUDGMENT NOTWITHSTANDING THE VERDICT IN A PATENT CASE.

It is the appellee's view that the trial court's right, in view of the Seventh Amendment, to direct a verdict or enter a judgment n.o.v. in a patent case does not require reconsideration by this Court. Were this not so, the United States Supreme Court would not have denied certiorari in:

Lunn v. F. W. Woolworth Co. (C.A. 9, 1953), 207 F. 2d 174, c. d. 346 U.S. 900;

Ryan Distributing Corp. v. Caley (C.C.A. 3, 1945), 147 F. 2d 138, c. d. 325 U.S. 859, 65 S.C. 1199;

Refrigeration Patents Corp. v. Stewart Warner Corp. (C.C.A. 7, 1947), 159 F. 2d 972, c. d. 331 U.S. 834, 67 S.C. 1515;

Packwood v. Briggs & Stratton Corp. (C.A. 3, 1952), 195 F. 2d 971, c. d. 344 U.S. 844, 73 S.C. 61;

in which the protection of the Seventh Amendment was strenuously and unsuccessfully urged upon the Supreme Court.

VI. THE TRIAL JUDGE IN A PATENT CASE HAS A DUTY TO DIRECT A VERDICT WHERE THERE WAS NO SUBSTANTIAL EVIDENCE WHICH WOULD JUSTIFY A VERDICT FOR PLAINTIFF-APPELLANT.

The right to direct a verdict in a patent case, or as a matter of fact in any type of case, depends upon whether we are concerned with questions of fact or questions of law. Since earliest times, this Court and the Supreme Court have been plagued with petitions to decide whether the validity of a patent is a question of fact or law. However, the Supreme Court has consistently held that when the facts are little in dispute and no conflict in testimony is involved, the question of validity is a question of law. The Supreme Court's last statement of this well established rule was in *Great Atlantic and Pacific Tea Co. v. Super Market Equipment Co.* (1950), 340 U.S. 147, 71 S.C. 127, hereinafter cited as *A & P* case, in which case Justices Douglas and Black, in a concurring opinion, went even further and held it to be a question of law *in all cases.*

In the present case, these separate views need not be considered for there is no serious contention that the facts are in dispute or that there is any necessity

to resolve any conflict in the testimony. As a consequence, this is clearly a case where patentability is to be treated as a question of law and the pertinent rule is well stated in *United States v. Esnault-Pelterie* (1938) 303 U.S. 26, 58 S.C. 412, where the court states at page 30:

> "* * * where, with all the evidence before the court, it appears that no substantial dispute of fact is presented, and that the case may be determined by a mere comparison of structures and extrinsic evidence is not needed for purposes of explanation, or evaluation of prior art, or to resolve questions of the application of descriptions to subject-matter, the questions of invention and infringement may be determined as questions of law."

Applying this rule, in an appeal from the denial of a motion to direct the verdict in a patent case, the Supreme Court in *Market Street Cable Railway Company v. Rowley* (1895), 155 U.S. 621, 15 S.C. 224, reversed the trial court emphasizing at pages 625 to 630 that the trial court had the *duty* to so direct the verdict:

> "Did the court below err in refusing to instruct the jury to find a verdict for the defendant on the ground that the patent sued on was void for want of novelty?
>
> "The defendant put in evidence a number of patents prior in date to the plaintiff's, and asked the court to compare the inventions and devices therein described with those claimed by the plaintiff. No extrinsic evidence was given or needed to explain terms of art, or to apply the

descriptions to the subject-matter, so that the court was able, from mere comparison, to say what was the invention described in each, and to affirm from such mere comparison whether the inventions were or were not the same. The question was, then, one of pure construction and not of evidence, and consequently was matter of law for the court, without any auxiliary fact to be passed upon by the jury."

"If, upon the state of the art as shown to exist by the prior patents, and upon a comparison of the older devices with those described in the patent in suit, it should appear that the patented claims were not novel, it becomes the duty of the court to so instruct the jury * * *"

"* * * In view, then, of the state of the art as manifested by several prior patents, we think it is plain that the patent of Lyon and Munro is void for want of patentable novelty, and that the court below erred in not so instructing the jury."

Appellee contemplates that appellant will attempt to label this case as an exception and distinguish it from the case at bar because there was "extrinsic evidence." However, if appellant argues that the patent and the prior art need explanation, the answer is found in the obvious simplicity of the patent (admitted by appellant in his brief on page 8) and of the prior art. Furthermore, this same argument has been found entirely wanting where the patents involved were simple and it is clear that such extrinsic evidence is unnecessary. *A & P* case, *supra; Crest Specialty v. Trager et al.* (1952), 341 U.S. 912, 71 S.C. 733.

Thus, when there is no conflict of testimony, no question arises relative to the court's setting aside any question of fact—for none is involved. The real point is whether, considering the clear showing of the patent and the prior art, the margin of difference between the prior art and the patent rises to the dignity of invention. Basically, this is the same question which was presented to the Supreme Court in the *A & P* case wherein it was argued that an appellate court could not set aside a finding of invention made by the trial court. This contention was completely answered, on pages 153-4:

> "The questions of general importance considered here are not contingent upon resolving conflicting testimony, for the facts are little in dispute. We set aside no finding of fact as to invention, for none has been made except as to the extension of the counter, which cannot stand as a matter of law. The defect that we find in this judgment is that a standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components. It is on this ground that the judgment below is reversed."

This statement contains the crux of the matter; *it is the standard of invention which controls,* and it is this principle which the Courts of Appeals, which have recently considered the question, have followed in approving the setting aside of jury verdicts in patent cases where the proper standard has been ignored.

descriptions to the subject-matter, so that the court was able, from mere comparison, to say what was the invention described in each, and to affirm from such mere comparison whether the inventions were or were not the same. The question was, then, one of pure construction and not of evidence, and consequently was matter of law for the court, without any auxiliary fact to be passed upon by the jury."

"If, upon the state of the art as shown to exist by the prior patents, and upon a comparison of the older devices with those described in the patent in suit, it should appear that the patented claims were not novel, it becomes the duty of the court to so instruct the jury * * *"

"* * * In view, then, of the state of the art as manifested by several prior patents, we think it is plain that the patent of Lyon and Munro is void for want of patentable novelty, and that the court below erred in not so instructing the jury."

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Thus, when there is no conflict of testimony, no question arises relative to the court's setting aside any question of fact—for none is involved. The real point is whether, considering the clear showing of the patent and the prior art, the margin of difference between the prior art and the patent rises to the dignity of invention. Basically, this is the same question which was presented to the Supreme Court in the *A & P* case wherein it was argued that an appellate court could not set aside a finding of invention made by the trial court. This contention was completely answered, on pages 153-4:

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A recent opinion of this Court is *Berkeley Pump Co. v. Jacuzzi Brothers, Inc.* (CA 9, 1954); ..... F. 2d ....., 102 USPQ 100.

Berkeley brought suit against Jacuzzi charging the latter with infringement of the Berkeley patent and demanded damages and reasonable attorney's fees. At the conclusion of the plaintiff's case in chief, the Honorable Michael J. Roche directed the jury to return a verdict in favor of Jacuzzi. Judgment was entered on this verdict and the appeal followed. Jacuzzi's motion for a directed verdict was on the premise that the evidence revealed the subject matter of the patent in suit did not constitute invention. This Court stated:

> "Obviously the directed verdict rested on the conclusion of the judge that, in the light of all the evidence adduced, it was his judicial duty to direct such a verdict at the hands of the jury."

This Court reviewed the evidence and determined that the trial judge acted within the scope of his authority in directing a verdict in favor of the defendant. In so concluding the Court stated what constitutes invention within the meaning of the law and referred particularly to the *A & P* case; *Kwikset Locks v. Hillgren* (CA 9, 1954), 210 F. 2d 483; *Jacuzzi Brothers v. Berkeley Pump Co.* (CA 9, 1951), 191 F. 2d 632; *Photo Chart v. Photo Patrol* (CA 9, 1951), 189 F. 2d 625; and *Himes v. Chadwick* (CA 9, 1952), 199 F. 2d 100.

This Court concluded that the evidence in the case failed to show that the alleged invention arose to the

standard defined by these cases and that on the evidence before him and under the rules of these cases that the Learned District Judge acted within the scope of his authority when he concluded that the patent in suit was invalid and directed a verdict.

In *Himes et al. v. Chadwick, supra,* this Court had before it for determination the question of whether or not the District Court in rendering a judgment for the defendant notwithstanding the verdict was acting within its authority. This was an action for infringement of a patent and after the trial and at the conclusion of the evidence the plaintiff moved for a directed verdict. The motion was denied and the case was submitted upon instructions whose correctness was not challenged by either party. The jury returned a verdict finding the claims in issue to be valid and infringed. Thereupon the defendant moved for a judgment notwithstanding the verdict which motion was granted. Judgment was entered adjudging the claims at issue to be invalid and, in addition, that the claims of one of the patents were not infringed. This Court stated the problem to be (p. 102):

> "On this appeal from the judgment, primary emphasis is placed upon the proposition that the presence or absence of patentable invention, and whether there was infringement, were questions of fact and that it was the province of the jury to weigh the evidence and decide these questions. It is asserted that the circumstances of this case are not such that the trial court had the right or the power to set aside the verdict because there was substantial evidence of novelty and inven-

tion in respect to each patent as well as substantial evidence of infringement of the Himes patent.

The question before us is whether 'the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict' and that such conclusion was the one arrived at by the trial judge.

The right and duty of the trial judge to direct a verdict in a patent case, where the circumstances indicate that the jury has departed from the relevant legal criteria by which either a jury or a judge must be guided in their or his fact-finding function, was well expressed in *Packwood v. Briggs & Stratton Corp.*, 3 Cir., 195 F. 2d 971, 973, as follows: 'A jury in a patent case is not free to treat invention as a concept broad enough to include whatever discovery or novelty may impress the jurors favorably. Over the years the courts of the United States, and particularly the Supreme Court, have found meaning implicit in the scheme and purpose of the patent laws which aids in the construction of their general language. In this process, rules and standards have been developed for use as guides to the systematic and orderly definition and application of such a conception as invention in accordance with what the courts understand to be the true meaning of the Constitution and the patent laws. Once such standards and rules are authoritatively announced any finding of "invention" whether by a court or a jury must be consistent with them.' We proceed then to inquire whether this was an appropriate case for the exercise of this power by the trial judge."

The Court then analyzed some of the evidence and stated (p. 103):

> "We must inquire whether the patent relied upon as an anticipation would teach the mechanic skilled in the art the solution to the problem claimed to be solved by the invention now in issue."

Further this Court said:

> "The question remains whether, applying the standards commonly followed in cases involving claims of anticipation, it can be said that the disclosures of the prior art negative invention notwithstanding some differences and advances which may in the circumstances be no more than those which would occur to any person possessed of ordinary mechanical skill. *Leishman v. General Motors Corp.,* 9 Cir., 191 F. 2d 522, 530. The problem is whether Parks produced something better than that which went before, and if it did, whether under the rules and standards which must be the guide for both the judge and the jury, the addition made here by the putative inventor amounted to invention."

The Court then analyzed the *A & P* case in which the Supreme Court made certain tests and standards and stated:

> "Measured by these standards and by the rules generally announced by the Supreme Court as tests for invention, we think that so far as the Parks patent is concerned, this is a clear-cut case of lack of invention and that under the rule

> we have stated above as to its claims it was the duty of the Court to enter a judgment n.o.v."

This Court in the case of *Lunn v. F. W. Woolworth Co., supra,* decided June 29, 1953, had before it a matter in which, at the close of all of the evidence, the defendant had moved for a directed verdict which was denied. Thereafter, the jury returned a verdict finding that the patent was valid and infringed which verdict was allowed to stand by the District Court.

This Court described the plaintiff's patent, referred to only three prior art patents, and found:

> "Thus the evidence conclusively showed that claim 4 of plaintiff's patent was invalid for lack of novelty, lack of invention or lack of both novelty and invention. We therefore hold that defendant's motion for a directed verdict should have been granted."

In each of its opinions this Court has referred to the decision of Judge Hastie in *Packwood v. Briggs & Stratton Corp., supra,* which was a patent infrigement suit in which a jury found the plaintiff's patent valid and infringed by the defendant. Thereafter the trial judge, while candidly stating his own conviction that the patent was invalid for lack of invention, denied the defendant's motion for a judgment n.o.v., reasoning that he had no authority to substitute his judgment on the contested issue of invention for that of a jury. The Court of Appeals for that circuit held that he not only had the power but the *responsibility* and *duty* and stated:

"On this appeal we have to decide whether this deliberate self restraint was error or proper deference to the role and action of the jury."

* * * * * * *

"This finding of invention and validity was very clearly wrong. A jury in a patent case is not free to treat invention as a concept broad enough to include whatever discovery or novelty may impress the jurors favorably. Over the years the courts of the United States, and particularly the Supreme Court, have found meaning implicit in the scheme and purpose of the patent laws which aids in the construction of their general language. In this process, rules and standards have been developed for use as guides to the systematic and orderly definition and application of such a conception as invention in accordance with what the courts understand to be the true meaning of the Constitution and the patent laws. Once such standards and rules are authoritatively announced any finding of 'invention' whether by a court or a jury must be consistent with them.

This is no peculiarity of patent law. Jury findings of negligence or proximate cause must comport with common law rules devised to give reasonable and systematic meaning to those generalities. For such rules, see Restatement of the Law, Torts, Negligence, Chs. 12-16. And so it is throughout the body of the common law. This authority and responsibility to keep jury findings within reasoned rules and standards is an essential function of United States judges today as it long has been of common law judges. See *Capital Traction Co. v. Hof,* 1899, 174 U.S. 1, 13-16, 19 S. C. 580, 43 L. Ed. 873. It stands

> as a great safeguard against gross mistake or caprice in fact finding."

Prior to its decision in the *Packwood* case, the Court of Appeals for the Third Circuit had in 1945, in the case of *Ryan Distributing Corporation v. Caley,* 147 F. 2d 138, pointed out that entry of a judgment n.o.v. is the appropriate corrective action when a jury has found a patent valid although the court's application of defining principles reveals "a clear-cut lack of invention".

The United States District Court for the Western District of Pennsylvania, District Judge Marsh, in the case of *Fraver v. Studebaker Corporation* reported at 112 F. Supp. 209, had before it a situation in which a motion by the defendant for a directed verdict was refused. Thereafter, a general verdict by a jury was returned in favor of the plaintiff and judgment was entered on the verdict. Subsequently, the defendant filed a motion to set aside the verdict and enter judgment in its favor. The District Court on the authority of the *Packwood* and *Ryan* cases, *supra,* was of the opinion that that motion should be granted. In so concluding, the court applied the standards of invention established by the Supreme Court in the *A & P* case and stated:

> "Summarizing, the court is of the opinion that the patent in suit is invalid, whether construed broadly or limitedly; if when limitedly construed it were deemed valid, as the jury found, then, as a matter of law, claim 1 thereof would not be infringed by the accused structure."

District Judge Fitzpatrick of the United States District Court for the Eastern District of Pennsylvania in 1953 had before him a similar situation in *Fischer and Porter Co. v. Brooks Rotameter Co.*, reported at 107 F. Supp. 1010. The jury returned a verdict for the plaintiff and the defendant moved to set aside the verdict under Rule 50 (b) of the Federal Rules of Civil Procedure.

The court then analyzed all of the law, the alleged invention and the prior art and granted the motion.

Wherefore the law uniformly must be and is that it is the duty of the trial judge and the jury to apply the standards of invention established by the United States Supreme Court and by this Court in the A & P case and in Himes v. Chadwick and when the trial court finds that the alleged invention does not measure up to these standards or tests it is his duty, even in cases where the jury has found that the patent is valid, to grant a judgment notwithstanding the verdict. If this is so when the jury has found the patent valid, clearly it is so when the jury is unable to find the patent valid as in the case in issue.

And the same law must apply to all matters of law, as, for example, when the court determines that the rules of infringement have not been followed by the jury. *Patent Scaffolding Co., Inc. v. Up-right, Inc.* (C.A. 9, 1952), 194 F. 2d 457.

Appellant has had his day in court and his case was given to the jury for its consideration. His rights were fully protected.

In the final analysis, then, appellant's difficulty arises from his failure to appreciate that any jury finding of "invention" must be "consistent with controlling standards". The yardstick against which invention is measured, like many other legal standards, is well established by the courts; the jury's only function is to set the improvement alongside this yardstick and make the necessary comparison as a matter of fact. But if, in doing so, a "standard of invention appears to have been used less exacting that that required" the verdict is defective (*A & P* case) and the "entry of judgment n.o.v. is the appropriate corrective action [because the] jury has found a patent valid although the court's application of defining principles reveals 'a clear-cut case of lack of invention.' " *Ryan Distributing Corporation v. Caley* and *Packwood v. Briggs & Stratton Corp., supra.*

Appellant, therefore, has not been deprived of his right to a jury trial. Furthermore, his right to a jury trial is no more sacred than the appellee's counterbalancing right to have *its* cause judged according to the established rules of law. As stated in *Galloway v. United States, supra,* the appellant's position which essentially denies any review of jury verdicts, imposes too great a risk upon the defendant. The Supreme Court stated at page 1088:

> "The true effect of imposing such a risk would not be to guarantee the plaintiff a jury trial. It would be rather to deprive the defendant (or the plaintiff if he were the challenger) of that right; or, if not that, then of the right to challenge the

legal sufficiency of the opposing case. The Amendment was not framed or adopted to deprive either party of either right. It is impartial in its guaranty of both. To posit assertion of one upon sacrifice of the other would dilute and distort the full protection intended."

VII. THE TRIAL JUDGE AND THE JURY MUST FOLLOW A STANDARD OF INVENTION.

The foregoing analysis clearly establishes the duty of the trial court and the jury to measure the alleged invention against the legal standard, and if the jury fails to follow this standard, the trial judge must set aside the verdict. The law is equally clear as to the standard or yardstick of invention to be applied to the patent in question.

The standard of invention which must be applied in this case is not the standard of invention which appeals to the Patent Office or to the "man on the street", but is the standard of invention which has been established by the courts: *A & P case; Photo Chart v. Photo Patrol, supra; Jacuzzi Bros., Inc. v. Berkeley Pump Co., supra; Himes v. Chadwick, supra; Kwikset Locks v. Hillgren, supra; Berkeley Pump Co. v. Jacuzzi Bros., Inc., supra; Lunn v. F. W. Woolworth Co., supra; Patent Scaffolding Co., Inc. v Up-right, Inc., supra; Hunter Douglas Corporation v. Lando Products, Inc.* (C.A. 9, decided August 18, 1954), ...F. 2d .....

The test which has been adopted by the Supreme Court in the *A & P* case and by this Court of Appeals is as follows:

> "This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned, and there is nothing to indicate that the lower courts scrutinized the claims in the light of this rather severe test."
>
> "Two and two have been added together, and still they make four."
>
> "Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained, when on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly."

A standard of invention having been established and there being no question of the duty of the jury, the trial court, and this Court to measure the alleged Hansen invention against this standard, the subsequent review of the prior art and prior uses clearly

demonstrates the invalidity of the Hansen patent, as a matter of law.

VIII. THE PATENT IN SUIT IS INVALID.

The patent in suit is invalid because the business record defined by its claims does not constitute invention over the prior art as exemplified by the business forms used by the Pontiac Motor Car Company, the pasted-in forms used by the appellee, or over the prior art patents to Groby, Graham, Bach and Iseri, and for the further reason that the alleged invention does not reveal a flash of creative genius but at most merely the skill of the calling.

A. An Analysis of the Patent in Suit.

Appellant devotes less than a page of his opening brief to a description of the alleged invention of the patent in suit. However, appellee believes that a complete analysis of the patent in suit is essential to a proper determination of the appeal; hence the following comments:

As illustrated in Figure 1 of the Hansen patent (P. Ex. 1) (which is the first page of drawings of the patent), appellant provides a so-called foundation sheet which is nothing more nor less than a sheet of appropriate size to fit in a binder, upon which there are numerous horizontal and vertical lines dividing the sheet into horizontal and vertical columns. There is nothing new about horizontal and vertical lines on an accounting sheet.

At the top of the vertical columns there are provided certain "indicia" which are nothing more or less than captions or titles to define the type of information which is to be found in these vertical columns under these captions. In other words (and still referring to Figure 1 of the drawings of the Hansen patent) this Court will observe that the indicium "Milk and Cream" appears at the top of one of the columns. This indicium indicates that all information in that column relates to "Milk and Cream". In the same manner all material appearing in the column under the heading "Produce" relates to "Produce". Up to the present time nothing new or novel has been added.

The second page of drawings of the Hansen patent discloses two figures, Figures 2 and 3. Figure 2 illustrates a second sheet of paper which is provided with vertical perforations which are numbered 29. These perforations permit the sheet to be torn into a number of long strips. Each of these strips is provided with a heading or indicium at the top, such as the word "Produce" and is also provided with lines, horizontal and vertical, which divide the strip into various portions in which certain information can be placed. It will be pointed out later that there is nothing new or novel in providing perforations to tear a sheet into strips, or in dividing a bookkeeping sheet, whether it is in the form of an enlarged sheet or a narrow strip into well defined areas to accommodate certain specific figures or information. It will also be shown that there is nothing new in providing various

indicia at the head of such gummed strips to designate their particular ultimate location on a foundation sheet.

It will also be noted in Figure 2 that there are certain figures in the columns, such as the figures 402, 415, 421, 422, etc. These figures do not play a part in the Hansen invention. They are merely code numbers referring to a particular store; for example, the code number 402 refers to one of appellee's stores and rather than identify the store by its address, etc., appellee has adopted this code system. Appellant, being aware of that at the time he made his alleged invention, adopted these code numbers.

Appellant illustrates, in Figure 3 of his patent, the manner in which the strips (which are produced by tearing the sheet illustrated in Figure 2 along the perforated lines) are affixed, by gluing, to the foundation sheet (of Figure 1) and it will be noted that the indicium at the top of the strip is positioned in such a manner that it is immediately below a similar indicium on the foundation sheet. Thus, as illustrated in Figure 3, the word "Produce" on the elongated strip is immediately beneath the word "Produce" on the foundation sheet. In the same manner (referring to Figure 1) should the elongated strip bear the indicium "Milk and Cream" it would be positioned in the column identified by the indicium "Milk and Cream" on the foundation sheet.

The claims of the patent in suit define the alleged invention and an analysis of at least one of the claims will perhaps be very helpful to the court.

Claim 9 (probably the broadest claim) reads as follows:

> "The combination of a foundation form having a plurality of columns determined by spaced vertical lines, and a sheet vertically scored to form a plurality of detachable strips applicable to said foundation form between the column determining lines thereof, means for securing said strips to a desired column in said foundation form, and means for indicating proper or improper location of such strips when applied to said foundation form."

A comparison of the language of the claim with the apparatus disclosed in the drawings reveals:

(1) *"A foundation form having a plurality of columns determined by spaced vertical lines".* (The foundation form is the entire sheet illustrated in Figure 1 of the patent and the columns are, of course, the areas defined by the vertical lines 9.)

(2) *"and a sheet vertically scored to form a plurality of detachable strips applicable to said foundation form between the column determining lines thereof."* (The vertically scored sheet adapted to form a plurality of detachable strips is illustrated in Figure 2 of the patent in suit and it will be noted that the strips thus formed are slightly narrower than the vertical columns on the foundation sheet illustrated in Figure 1.)

(3) *"means for securing such strips to a desired column of said foundation form."* (The reverse side of the strips are provided with glue or some

other adhesive so that they may be secured to the foundation sheet.)

(4) *"and means for indicating proper or improper location of such strips when applied to said foundation form"*. (The means for indicating proper or improper location are, of course, the indicia on the foundation sheet and on the vertical strips.)

Thus we have Hansen's alleged invention which even Hansen admits is simple. (Appellant's opening brief, p. 8.)

To further aid this Court in defining the alleged invention, we respectfully direct this Court's attention to the opinion of the Court of Customs and Patent Appeals, *In re Hansen* (C.C. & P.A. 1946), 154 F. 2d 684. In that opinion the court stated that the invention was restricted to the simultaneous coexistence of four essential features and cited the inventor's own definition of his alleged invention:

> "So, as epitomized in the brief for appellant the structure embraces four elements alleged to be basic, viz.: '* * * (1) a foundation form having columns, (2) indicia on said foundation form identifying such columns, (3) strips attachable in the columns of the foundation form in a manner to leave the column indicia exposed, and (4) corresponding or matching indicia on such strips.'
>
> The brief further alleges that 'The absence of any one of these basic elements divests the invention of its identity,' and 'This is important from the viewpoint of the prior art.' "

At the trial Mr. Hansen agreed that these elements were essential.

> "Q. So that Claim 1 requires as an essential element that both of these should be exposed simultaneously, does it not?
>
> A. Yes, sir.
>
> Q. Then, Mr. Hansen, if upon the application of a strip to a foundation form, these two indicia were not both exposed, you would not have that combination of that claim, would you?
>
> A. No, that is right." (V. III, p. 28, lines 24-25, p. 29, lines 1-5.)

Mr. Hansen further testified that ALL the claims required the simultaneous exposure of the indicium on the foundation sheet and the indicium on the gummed strip when the gummed strip was positioned on the foundation sheet. (V. III p. 29, lines 21-23; p. 34, lines 6-12; p. 35, line 18 to p. 36, line 1; p. 38, line 12 to p. 40, line 8, inclusive.)

Stripped of excess verbiage therefore, the alleged invention may be defined as the combination of four features, all of which appellee will show to have been old and in the public domain prior to Hansen's alleged invention.

B. An Analysis of the Art Relied Upon by the Patent Office and the Court of Customs and Patent Appeals.

An analysis of the opinion of the Court of Customs and Patent Appeals in *In re Hansen, supra,* reveals that that court referred to the patents issued to Lubin, Pezze and Wilford. Large photographic representations of these patents are in evidence as de-

fendant-appellee's exhibits Z, AA, AB and AC. These exhibits clearly show that these patents do not reveal the four elements which the Court of Customs and Patent Appeals said constituted the alleged invention, as pointed out previously herein on page 27 of this brief. For example:

(1) The patent to Lubin, No. 1,318,163 will be found in defendant-appellee's exhibit AM, booklet of patents. This patent discloses two blanks positioned one over the other, and which are provided with suitable lines on which the articles ordered or mentioned may be designated. The sheet illustrated in Figure 2 is provided with a gummed backing. Information written on the top sheet will, by virtue of carbon paper placed between the sheets, be transferred to the bottom sheet. The bottom sheet is provided with perforated lines 12 which extend the width of the sheet and by virtue of this arrangement the various items may be torn from the blank and separated from each other so that they may be fixed by their gummed backing to department sales checks, thus eliminating transcription problems. (Specification of the Lubin patent, page 1, lines 40 through 80.) Lubin fails to show indicia on the foundation form and on the strip. In other words, when Lubin's strip is removed as a part of the bottom sheet it is simply put on a sales slip and apparently no effort is made to match any indicia thereon with any other indicia on the sales slip.

(2) The patent to Wilford, 1,634,240, which was relied upon by the Court of Customs and Patent Ap-

peals, is also found in Exhibit AM, and discloses an insurance policy form in which information concerning an insured individual may be placed upon certain previously arranged sheets by a doctor. Some of the sheets are then torn into strips and the strips are glued to master sheets. Wilford fails to show the matching indicia as required by the patent in suit.

(3) Pezze is an English patent found at the end of Exhibit AM, which merely shows some means of providing column sheets which may be separated and glued on other sheets. The disclosure, however, is not complete.

In addition, the Patent Office had before it Groby patent 1,461,757, which is also found in Exhibit AM. This patent reveals a foundation sheet which is adapted to receive a number of gummed strips. However, the indicia are positioned on the gummed strips and are adapted to overlie the corresponding indicia on the foundation sheet so that when the strip is placed on the foundation sheet, the indicia do not show. As a matter of fact, in the Groby patent it is apparent that the indicia are not supposed to match.

The foregoing analysis of the prior art relied upon by the Court of Customs and Patent Appeals and the Patent Office reveals that these patents do not show the four elements claimed. It also shows that they do not anticipate the alleged Hansen invention. It was on this incomplete and non-anticipating evidence, and on this alone, that the Court of Customs and Patent Appeals rendered its decision.

Appellee asserts that any presumption of validity arising by virtue of the issuance of the Hansen patent is dissipated by the existence of more pertinent art which will be subsequently analyzed and which was not relied upon by the Patent Office or the Court of Customs and Patent Appeals. This is the law of this Circuit. In *Jacuzzi Brothers v. Berkeley Pump Company, supra,* the Honorable Judge Fee said at page 634:

> "But further, a great many of the patents, which were brought to light in this lawsuit and considered by the Trial Court, had not been previously considered by the Patent Office. Even one prior art reference, which has not been considered by the Patent Office, may overthrow the presumption of validity, and, when the most pertinent art has not been brought to the attention of the administrative body, the presumption is largely dissipated. Such is the case here."

C. An Analysis of the Prior Art Relied Upon by Appellee.

The prior art relied upon by appellee which was brought to the attention of the trial court and which was not before the Patent Office and the Court of Customs and Patent Appeals, consists of the patents to Iseri (Exhibits AG, AH and AI), Graham (Exhibits AE), Bach (Exhibits AF), and the prior uses by the Pontiac Motor Car Company (Exhibits Q, R, S and AJ) and by the appellee (Exhibit U).

1. The Iseri Patent.

The patent to Iseri, 1,271,167, dated July 2, 1918 (Exhibits AG, AH and AI), shows a foundation

sheet having an indicium thereon consisting of the words "Journal", "Ledger" and "Daily Balance Book", respectively. Iseri also shows in Figure 1 an invoice at the bottom of which he provides a number of perforated gummed strips, each of which bears a corresponding indicium at the extreme left end, as for example (reading from the bottom up) the words "Journal", "Ledger" and "Daily Balance List". When information has been totalized under "Invoice" it is put on gummed strips and glued to the proper foundation sheet. The proper foundation sheet is the one which has the corresponding indicium. In this manner, gummed strips bearing the legend "Journal" are put upon the "Journal" foundation sheet, and so on.

The brief statement of invention adopted by the Court of Customs and Patent Appeals (quoted on page 27 of this brief) reads directly upon the Iseri disclosure. For example: "(1) a foundation form having columns," (see Iseri, Figures 3, 4 and 5), "(2) indicia on said foundation form identifying such columns" (see the indicia at the top of Iseri's foundation forms as illustrated in Figures 4, 5, and 6, to wit: "Journal", "Ledger" and "Daily Balance Book"; "(3) strips attachable in the columns of the foundation form in a manner to leave the column indicia exposed, "(note the manner of attachment of the gummed strips as shown in Figures 3, 4 and 5 of Iseri); and "(4) corresponding or matching indicia on such strips" (see the corresponding indicia on the gummed strips at the bottom of Figure 1 as they are

applied in Figures 3, 4 and 5 in which all of the said indicia are at all times exposed).

It is respectfully submitted, therefore, that the alleged invention of the patent in suit is found in the patent to Iseri. Hansen therefore discloses no invention whatever. Any minor differences are immaterial because in his own patent appellant said specific details were not important and he didn't intend that his invention be limited to them. Note, for example, the language in the specification of the patent in suit, column 5, lines 8 through 16 inclusive:

> "My invention is therefore productive of novel and improved results in the preparation and keeping of records, and although the description thereof has been devoted to a preferred embodiment of the same as applied to one illustrative use, the *combination of a foundation form and appropriate strips is applicable to a variety of situations. I therefore, do not desire to be limited in my protection of the specific details* of the embodiment described except as may be necessitated by the appended claims." (Emphasis added.)

It is interesting to note that the claims of the Hansen patent read upon the Iseri structure. For example, Claim 9 reads as follows:

> "The combination of a foundation form having a plurality of columns determined by spaced vertical lines, and a sheet vertically scored to form a plurality of detachable strips applicable to said foundation form between the column determining lines thereof, means for securing such strips to a desired column of said foundation form."

The application of this claim to Iseri is obvious. The only difference is that the claim calls for vertical rather than horizontal columns. Vertical columns are shown in Graham (Exhibit AE) and even appellant has not suggested that the use of vertical rather than horizontal columns constitutes a "flash of genius" or anything more than the skill of the calling.

It is well settled that that which infringes if later, would anticipate if earlier. *Peters v. Active Mfg. Co.* (1889), 129 U.S. 530, 537, 32 L. Ed. 738; *Knapp v. Morss* (1873), 150 U.S. 221, 228, 37 L. Ed. 1059; and *Miller v. Eagle Mfg. Co.* (1894), 151 U.S. 186, 200, 38 L. Ed. 982, 986.

In other words, if a device would infringe (had it been subsequent to the patent in suit), it would anticipate the invention of the patent in suit if earlier. Thus, since the Iseri forms would infringe the Hansen claims, they will also anticipate these claims because they were in the prior art before Hansen's alleged invention was made.

Iseri's disclosure has all of the elements claimed by Hansen and in the same combination claimed by Hansen and therefore clearly anticipates his claims and renders Hansen's patent invalid.

2. The Graham Patent.

The patent to Graham, 1,442,266 (Exhibit AE) likewise anticipates the alleged Hansen invention. Note that Graham shows a foundation sheet 6, in Figure 4,

which is adapted to accommodate a number of strips (4) which may be gummed thereto. At the top of each of the strips there is an indicium, as, for example, "Road No. 2, Carriers A, B, C". At the far right hand there is a further indicium which reads "Roads No. 1 to 10" which is not covered by the strips (4) when they are secured to the foundation sheet.

It is respectfully submitted that the Graham patent, like Iseri, and to the same extent as Iseri, shows the four fundamentals relied upon by the Court of Customs and Patent Appeals and recited by Mr. Hansen as being essential.

The brief statement of invention adopted by the Court of Customs and Patent Appeals (quoted on page 27 of this brief) reads directly upon the Graham disclosure. For example: "(1) a foundation form having columns" (see Graham's Figure 4), "(2) indicia on said foundation form identifying such columns" (see Figure 4 and the indicium in the upper right-hand corner reading "Roads No. 1 to 10"), "(3) strips attachable in the columns of the foundation form in a manner to leave the column indicia exposed" (see the strips 4 in Figure 4 of Graham); and "(4) corresponding or matching indicia on such strips" (see corresponding indicia at tops of strips).

In the same manner as Iseri, claim 9 of the patent in suit may be read upon the Graham disclosure.

Therefore Graham anticipates Hansen and renders the Hansen patent invalid.

3. **The Bach Patent.**

The patent to Bach, 758,808 illustrates, in Figure 1, a foundation sheet (a) having a number of horizontal columns (k) each of which is provided with an indicium consisting of the legends "first hand", "second hand", etc. The gummed strips (g) are shown at the extreme right hand side and are adapted to be separated along perforated lines and secured to the foundation sheet as indicated in Figure 2. The gummed strips (g) each have small indicium (m) consisting of small numbers which clearly identify the strips. The gummed strips (g) may be glued to the foundation sheet (a) to permit simultaneous exposure of the legend (m) on the gummed strips and the legend at the end of each column.

The characteristic limitation in the claims of the Hansen patent is:

> "upon application of said strips to said foundation form, the indicia on said columns may be exposed to indicate proper or improper location of strips on said foundation form"

which is fulfilled in Bach.

The brief statement of invention adopted by the Court of Customs and Patent Appeals (quoted on page 27 of this brief) reads directly on Bach. For example: "(1) a foundation form having columns" (see Bach's form a); "(2) indicia on said foundation form identifying such columns" (see the legends on the form, "1st hand, 2nd hand, etc.") "(3) strips attachable in the columns of the foundation form in a manner to leave the column indicia exposed" (note

the perforated strips g); and "(4) corresponding or matching indicia on such strips" (see the small numerals m on the strips).

Claim 9 of the patent in suit reads directly upon the Bach disclosure. If Bach devices were first introduced at the present time, they would constitute an infringement of claim 9. Since that which infringes if later anticipates if earlier, it is respectfully submitted that the Bach patent likewise anticipates the alleged invention of the patent in suit. *Peters v. Active Mfg. Co.; Knapp v. Morss;* and *Miller v. Eagle Mfg. Co., supra.*

The Bach patent discloses the four elements required by Hansen and clearly renders the patent invalid.

4. The Pontiac Prior Use.

The Pontiac prior use (Exhibits Q, R, S and AJ) discloses a foundation form and a number of gummed strips secured thereto. At the head of each column of the foundation form there is an indicium consisting of the names of the months of the year. At the time the gummed strips are secured to the foundation form they likewise have corresponding indicia which permits the clerk who secures the gummed strips to the foundation form to ascertain that the same are properly placed. (V. III, pp. 214, 215.) Therefore the elements of Hansen's alleged invention are likewise present in this prior use. The existence of this prior use is not questioned, and it was publicly and ex-

tensively used several years prior to the alleged making of Mr. Hansen's invention and more than one year prior to the date upon which he filed his patent application.

It will be apparent that the four elements recited by the Court of Customs and Patent Appeals may be applied to the Pontiac prior use in the same manner and to the same extent as they have been applied to the Iseri, Graham and Bach disclosures previously in this memorandum.

The Pontiac prior use therefore discloses the four elements required by the Hansen claims and clearly invalidates the Hansen patent.

5. The Appellee's Prior Use.

The appellee used peg board strips which are the equivalent of gummed strips in its Denver office in 1939 and glued them in a book. (Exhibit U.)

This use is strikingly similar to the type of use shown by Graham in Figure 1 of the patent No. 1,442,266 (see Book of Patents Exhibit AM), wherein Graham takes a group of sheets of paper (2) and glues them in overlaid fashion to another sheet of paper (1). In the patent specification, Graham states that the overlaid glued forms are the equivalent of, and simply a modification of what was shown in Exhibit AE. Since these two types of forms are identified in the prior art as being equivalents, it is apparent that they are still equivalents and that Exhibit U is the equivalent of gluing strips on pages of a book.

The defendant's own prior use shows that the equivalent of Hansen's alleged invention was in the public domain and that the Hansen patent is invalid.

D. Since the Prior Art Relied Upon by Appellee Clearly Demonstrates the Invalidity of the Patent in Suit, It Is the Duty of the Court to Determine Invalidity as a Matter of Law.

The foregoing analysis is based upon a study of the prior art and the claims and specifications of the Hansen patent, all without the benefit of explanatory testimony or evidence. When such a study without the need of extrinsic evidence will permit the court to compare the prior art, prior uses and the alleged invention, then the court clearly may determine, as a matter of law, the question of validity.

This is in line with the holding of the Supreme Court of the United States in *Market Street Cable Railway Co. v. Rowley* (1895), 155 U.S. 621, 15 S.C. 224:

> "The defendant put in evidence a number of patents prior in date to the plaintiff's, and asked the court to compare the inventions and devices therein described with those claimed by the plaintiff. No extrinsic evidence was given or needed to explain terms of art, or to apply the descriptions to the subject-matter, so that the court was able, from mere comparison, to say what was the invention described in each, and to affirm from such mere comparison whether the inventions were or were not the same. The question was, then, one of pure construction and not of evidence, and consequently was matter of law for the court, with-

out any auxiliary fact to be passed upon by the jury."

"If, upon the state of the art as shown to exist by the prior patents, and upon a comparison of the older devices with those described in the patent in suit, it should appear that the patented claims were not novel, it becomes the duty of the court to so instruct the jury * * *"

It is clear after reviewing the appellee's prior art that the patent in suit is invalid because the business record defined by its claims does not constitute invention in that it does not reveal the flash of creative genius but at most merely the skill of the calling, and when this is apparent, it is the duty of the court to determine it as a matter of law.

IX. THE PATENT IN SUIT IS NOT INFRINGED.

A. Appellee's Alleged Infringing Forms.

Appellant neglected to point out to this Court what acts of appellee were alleged to constitute infringing acts. It will, therefore, be necessary to show the type of business records used by appellee and which allegedly infringe the Hansen patent.

The evidence shows that appellee used several different kinds of forms all of which are alleged to infringe the Letters Patent in suit. For example, in its zone office in San Francisco, California, appellee used forms of the kind exemplified by plaintiff-appellant's Exhibit 2. In its zone offices in Butte, Montana; Se-

attle, Washington; Dallas, Texas; New York, New York; Oklahoma City, Oklahoma; Omaha, Nebraska; Phoenix, Arizona; Salt Lake City, Utah; Tulsa, Oklahoma; Spokane, Washington, and El Paso, Texas, appellee used forms of the kind exemplified by defendant-appellee's Exhibits T-1 to T-11, inclusive.

The various forms, those used in the San Francisco zone and those used elsewhere, differ in many respects. For example, and referring particularly to Exhibits T-1 to T-11 inclusive, it will be noted that these forms differ as follows:

On Exhibit T-1 the indicia "Meat Sales" on the foundation sheet is found in longhand. The original indicia at the top of the columns are noted as "Column 1, Column 2", etc. The strips entitled "Meat Sales" cover the indicia at the heads of the columns. The matching indicia, therefore, are the longhand notations "Meat Sales" at the top of the foundation sheet and the printed legends "Meat Sales" at the top of each of the strips.

Exhibit T-2 is similar to T-1 in many respects except that it refers to groceries.

Exhibit T-3 indicates that there was no indicium on the foundation sheet.

Exhibit T-4 illustrates a single printed indicium, "Grocery or Meat Purchases", at the top of the foundation sheet and similar indicia at the top of each of the strips. The indicia on the strips match only the single printed indicium at the top

of the foundation sheet and do not match the printed indicia at the top of each of the printed columns on the foundation sheet.

In Exhibit T-5, a longhand indicium is found at the top of the foundation sheet and each of the columns is provided only with a column number. The strips do not match any of the indicia.

In Exhibit T-6, an indicium is found at the top of the foundation sheet and there are indicia on each of these strips. However, there is no matching and certainly no simultaneous exposure of the various indicia.

In Exhibit T-7, a longhand indicium is found at the top of the foundation sheet and each of the columns of the foundation sheet is provided with a column number. There is no similarity between the indicia on the strips and the indicia at the tops of each of the columns.

In Exhibit T-8, there is nowhere shown any similarity of indicia.

In Exhibit T-9, a longhand indicium is provided at the top of the sheet but the indicia on the various strips do not match the longhand indicia.

In Exhibit T-10 a printed indicium is provided on the foundation sheet, "Grocery or Meat Purchases". There are different headings on the columns and these are also printed. The strip indicia bear no similarity to either.

In Exhibit T-11 gummed strips only are shown. No foundation sheet is shown.

It was agreed by both parties, *and this includes appellant,* that the forms of the type used in zones other than San Francisco (Exhibits T-1 to T-11 inclusive), are substantially identical to those used in San Francisco (Exhibit 2).

Appellant relies heavily on this stipulation to show infringement. In other words, it is apparently appellant's theory that by showing that all of the forms are substantially identical, the question of infringement is closed. However, appellant has chosen to ignore the effect of this stipulation insofar as the same proves non-infringement, and would have this Court believe that it is an admission only by appellee and not an admission by appellant.

Appellant agreed that the forms used in San Francisco were substantially identical to those used elsewhere. Appellee has shown this Court that the forms which it used elsewhere are substantially identical to the prior art such as shown in the patents to Iseri, for example, and the prior use by the Pontiac Motor Company. For this reason the Hansen patent is invalid and the claims are not infringed.

It is as simple as this: Things which are equal to the same thing are equal to each other. To paraphrase this, the San Francisco forms are substantially identical to the forms used elsewhere by appellee which are substantially identical to the prior art. This being

so, the San Francisco forms, are likewise substantially identical to the prior art.

The one-sided interpretation placed upon the stipulation by appellant in his efforts to prove infringement is absolutely unjustified and appellant ignores appellee's right to use the stipulated similarity of the forms for comparison to the prior art and the patent in suit. Having accepted the stipulation for one purpose, appellant is bound by the stipulation for all purposes.

Further in this brief, appellee will show that forms of the type used in all zones other than San Francisco are identical to the prior art. That being the case the San Francisco forms are also substantially identical to the prior art and, therefore, no invention is defined and they cannot possibly infringe any claims of the Hansen patent.

B. Appellee's Alleged Infringing Forms Do Not Infringe the Patent in Suit Because They Follow the Prior Art.

It is respectfully submitted that the claims of the patent in suit are not infringed because the accused forms follow the prior art. The applicable law was clearly stated by the trial court in its instructions to the jury (V. IV, p. 522, lines 18-25):

> "It is a fundamental and well established rule of law that substantial identity between a business form accused of infringing and the prior art removes all possibility of infringement; therefore, if you find that the defendant's business forms are within the lessons of the prior art, then you

will find that they do not infringe the patent in suit and you must return a verdict for the defendant." *Casco Products Corp. v. Sinko Tool & Mfg. Co.* (C.C.A. 7, 1940), 116 F. 2d 119; *Galion Iron Works & Mfg. Co. v. Beckwith Mach. Co.* (C.C.A. 3, 1939), 105 F. 2d 941; *Thompson v. Boisselier* (1884), 114 U.S. 1, 5 S.C. 1042. (Authorities inserted.)

An examination of the alleged infringing forms, Exhibit 2 and the Exhibits T-1 through T-11) reveals that the follow the teaching of the prior art.

(1) The prior art and the accused forms use foundation sheets. (See Iseri, Graham, Bach, Pontiac prior use and appellee's own prior use.)

(2) The prior art and the accused forms use gummed strips. (See Iseri, Graham, Bach, Pontiac prior use and appellee's own prior use.)

(3) The prior art and the accused forms use legends or indicia on the foundation sheets. (See Iseri, Bach, Graham, Pontiac prior use and appellee's own prior use.)

(4) The prior art and the accused forms may be used in such a manner that when the gummed strip is secured to the foundation form, the indicia on the foundation form will be exposed simultaneously with similar indicia on each gummed strip. (See Bach and Iseri particularly.)

It is respectfully submitted, therefore, that it is clear beyond any shadow of a doubt that the alleged

infringing devices are in line with the prior art and follow the teachings of the prior art and for this reason do not infringe any of the claims of the patent in suit.

Some question has been raised as to whether Hansen requires indicium at the head of *each column* of the foundation sheet. Any such assertion may be summarily disposed of by a glance at the four elements defined by the Court of Customs and Patent Appeals and the Hansen specification.

Hansen himself did not intend that his invention be limited to the use of a different indicium at the head of each column of the foundation sheet. Note, for example, the disclosure of column 4 of the Hansen specification, lines 50 to 64:

> "It may also be of interest to the main office to be in a position to determine the total delivery over a period of time to any one of the departments of a store in the system. This may be obtained very conveniently through the application of carbon copies of the original daily strips, to a separate foundation form devoted exclusively to the daily delivery to that particular department for the stores of the whole system. Thus, if carbons of the daily produce strips are applied from day to day to a foundation form carrying the caption 'Produce', the total of such horizontal line of figures gives the total produce deliveries to the stores as indicated, and over a period of time represented by the number of strips."

This clearly shows that gummed strips all bearing the same indicia, as, for example, "Produce", could be

put on a single page bearing that single caption. Thus, it is admitted in the Hansen specification, that what is shown in his drawings is the equivalent of and is identical to a plurality of gummed strips having identical indicia mounted on a foundation sheet having a single caption at the top.

Conversely, while Hansen illustrates in his drawing a foundation sheet having different columns each with a different indicium, he states that it is the equivalent thereof to provide a single foundation sheet having a single caption.

The alleged infringing forms show the use of indicia at the head of each column or a single indicium at the top of the foundation sheet. Hansen's patent admits these are equivalent. It has been agreed by appellant that they are substantially identical. (See appellee's brief, p. 43.)

C. The Question of Infringement May Be Determined by the Court and Where There Is No Question That the Alleged Infringing Forms Follow the Prior Art, It Is the Duty of the Court to Find That the Patent in Suit Is Not Infringed.

This Court of Appeals gave tacit approval to the right of a trial court to grant a judgment n.o.v. on the matter of infringement alone in *Patent Scaffolding Co., Inc. v. Up-right, Inc., supra.* In that matter the case was tried to a jury which returned a verdict in favor of the plaintiff holding that the patent in question was valid and infringed. Judgment was entered on the verdict, but subsequently the defendant moved for judgment notwithstanding the verdict, stating as grounds therefor that the evidence required a finding

that the patent was invalid and that no infringement had been disclosed. The court sustained the motion upon the latter ground, vacated the verdict, and ordered judgment entered for appellant upon findings of noninfringement.

Thus, the matter of infringement, like that of validity, being one which can be determined by a simple examination of the patent in suit, the claims thereof, the alleged infringing device, and the limitations of the claims imposed by the prior art, may be determined by the court and the court may properly direct a verdict.

The court, in examining the claims of the patent in suit and applying them to the prior art is not, of course, obligated merely to "read" the claims upon the infringing device but is entitled to "read" the claims on the alleged infringing device in the light of the prior art.

The court, from an examination of the business forms alleged to infringe, and the prior art, can see, without the introduction of extrinsic evidence, that the two are substantially identical. This being so, there is no possibility of infringement. As previously pointed out, since all of the alleged infringing forms are substantially identical, to each other, and are substantially identical to the prior art, there is no infringement.

Thus, infringement being a matter which may properly be determined by the trial court, this Court can also inquire into the matter and render a decision

based upon a study of the claims of the patent in suit, the prior art, and the alleged infringing devices. Where there is no question that all of the appellee's devices are substantially identical to the prior art, both prior patents and prior uses, it is the duty of the Court to find that there is no infringement.

X. THE APPELLEE HAS A STATUTORY LICENSE UNDER THE PATENT IN SUIT.

35 *U.S.C.A.* 48 states:

> "Every person who purchases of the inventor, or discoverer, or with his knowledge and consent constructs any newly invented or discovered machine, or other patentable article, *prior to the application* by the inventor or discoverer for a patent, or who sells or *uses* one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor." (Emphasis added.)

The above statute was repealed by Section 5 of the Act of July 19, 1952, Chapter 950, 66 Stat. 815. However, the saving clause of Section 5 provides that: "Any rights or liabilities existing under such sections or parts thereof shall not be affected by this appeal." Clearly, then, appellee was, at the time this case was instituted, and still is, possessed of any and all rights which accrued to it under this statute. *Hartley Pen Co. v. Lindy Pen Co., Inc.* (D.C. S.D. Cal. 1954), ... F. 2d ....., 102 U.S.P.Q. 151.

A. A Patent on a Business Form Is Included Within the Scope of 35 USCA 48.

It is clear that a patent on a business form or record is included within this statute since the words "machine or other patentable article" have been held to mean an invention or thing patented. *Barton v. Nevada Consolidated Copper Co.* (D.C. Nev. 1932), 58 F. 2d 646, affirmed (C.C.A., 9), 71 F. 2d 381 and *Mix v. National Envelope Co.* (D.C. E.D. Pa. 1917), 244 F. 822.

In *Barton v. Nevada Consolidated Copper Co., supra,* recently cited in *Hartley Pen Co. v. Lindy Pen Co. Inc., supra,* the defendant installed an electric furnace for the purpose of making abrasive resistant steel-grinding balls and liners for its mills for grinding ore. The plaintiff was hired as a metallurgist in the research department for the express purpose of operating the new furnace and developing a method of making abrasive resistant steel balls with liners for the defendant's mills. The plaintiff perfected a process which was, in part, conceived prior to his employment by defendant and during the course of his employment and upon which he obtained a patent. The court found that the process covered by the patent was the process perfected during the plaintiff's employment and that this process was used in the business of the defendant with the knowledge and consent of the plaintiff prior to the application for patent. The plaintiff, after making application for a patent, took up the matter of compensation for the use of the process, but no agree-

ment was reached. The plaintiff then brought suit for an injunction against further infringement and for an accounting of benefits derived.

The District Court dismissed the complaint on the ground that the defendant had a right to use the process it was using, assuming it to be the same as the patented process, without compensation therefor under the provisions of R.S. 4899 (predecessor of 35 U.S.C.A. 48). The Court of Appeals affirmed the lower court and held that the words "machine or other patentable article" in R.S. 4899 should be construed to have the same comprehensive meaning as the Supreme Court attributed to the words "machine, manufacture, or composition of matter" in the earlier case of *McClurg v. Kingsland* (1843), 42 U.S. 202; that is, "invention" or "thing patented".

This Court further held that a patent on a process is as much within the statute as a patent on a machine. It also said that aside from the statute the defendant was entitled to use the process under the equitable doctrine which was announced in *United States v. Dubilier Condenser Corp.* (1933), 289 U.S. 178. While there was no specific discussion of the fact that the plaintiff had asked for compensation shortly after he applied for a patent, nevertheless it was obvious that the court was aware of that demand and considered that it had no effect under the statute.

From the foregoing it is apparent that a patent on a business form is included within the purview of 35 U.S.C.A. 48, (successor to R.S. 4899).

B. Appellant's Alleged Invention Was Used by Appellee Before Appellant Applied for His Patent and With His Knowledge and Consent.

It is uncontroverted that appellant's alleged invention was used by appellee before appellant applied for a patent. (See appellant's opening brief, pages 6 and 7, V. III, p. 60, lines 18 and 19.) It is also uncontroverted that the forms were used with his knowledge (V. III, p. 60, lines 24 and 25) and with his consent (V. III, p. 61, lines 11, 14-18), which brings the case squarely within the provisions of the statute.

C. Appellant's Alleged Demand for Compensation Does Not Vitiate the Consent Given by Appellant.

Appellant's alleged demand for compensation does not affect the appellee's right to the implied license conferred upon it by 35 U.S.C.A. 48. A similar situation arose in the case of *Dable Grain Shovel Co. v. Flint* (C.C. Illinois, 1890), 42 F. 686, affirmed 137 U.S. 141.

In this case, John Dable in the employ of the defendant, Dable Grain Shovel Co. as superintendent of machine, and prior to his application for the Letters Patent involved in the infringement suit, constructed and put into use in the defendant's grain elevators, machine for unloading grain from railroad cars. The inventor obtained two patents on these machines and assigned them to Flint. The court held that the plea of Section 7 of the Act of March 3, 1839 (predecessor to the Act of July 8, 1870, predecessor of 35 U.S.C.A. 48), was a complete defense to a suit for

infringement. The judge in the Circuit Court decision held that the fact that:

> "Dable demanded compensation for the use of the patents, and the defendants refused to recognize his rights thereto, does not, in my opinion, affect the defense raised by the plea, because if Dable had no right to compensation, a demand could not give him such right."

In the present case, the exact parallel arises. The statute having given appellee herein a license, appellant could not, by demanding compensation, deprive appellee of its right.

In *Barton v. Consolidated Copper Co., supra,* the plaintiff also asked for compensation but, nevertheless, the court held that the defendant had an implied license under the statute.

Appellant denied that the use was with his consent and urged that the appellee's use was permitted only by a contract. To find a contract he referred to a conversation with Mr. Arthur Stewart, now deceased. When confronted with his deposition (taken before Mr. Stewart's death) he had to admit that Mr. Stewart had not said yes and had not said no. (V. III, p. 131.) Obviously no contract existed because there was not a meeting of the minds.

Moreover, the only written document concerning the conversation between appellant and Mr. Stewart does not bear out appellant's statement. (See Ex. AL and V. IV, p. 390, lines 11-17.) It read as follows:

> "We did not agree to give Hansen anything, but a week later when Cambridge used Hansen as a messenger to take reports to this office, Hansen asked me if I thought he should have two hundred dollars ($200.00). I told him that it was not proper for the company to make payments of this kind when work was done by an employee."

This memorandum made in the regular course of business shows clearly that appellee never agreed to compensate appellant in any way. From this it is clear that there was no contract.

It is respectfully submitted that since it is established by uncontroverted evidence that the appellee used the alleged infringing forms with his knowledge and consent before appellant's application for a patent, that the question of whether or not the appellee has an implied license is one of law and may be decided by the judge without submission to the jury. *Pierson v. Eagle Screw Co.,* 19 F. Cases 672.

It is clear that such an implied license arises in favor of the appellee and to deprive itself of that right, appellee must have taken positive action for the express purpose of surrendering this license. No such positive action is shown in the record.

D. Under a Statutory License, Appellee Has the Right to Continue to Use the Business Forms Covered by the Hansen Patent.

Under a license conferred by 35 USCA 48, the appellee need not continue to use the specific item

but may make new items if the devices are of the type which are destroyed in their use or which, by their nature, require replacement. *Mix v. National Envelope Co.* (D.C. E.D. Pa. 1917), 244 F. 822; *Wiegand v. Dover* (D.C. N.D. Ohio 1923), 292 F. 255. For example, it would be absurd if it were urged that the appellee had the right only to use the specific forms which it had used before the date of the application for patent, that is, the specific pieces of paper, inasmuch as these forms are used and then kept. The forms are not available for re-use.

A very similar situation arose in the case of *Mix v. The National Envelope Company, supra.* In this case an employee salesman of the defendant envelope manufacturer induced the defendant to manufacture and sell a new style of envelope which he had invented and which he later assigned to the plaintiff. The defendant didn't push sales of this special type of envelope but only continued to fill orders as they came in. The envelope in the *Mix* case is similar to the accounting record in the case at bar inasmuch as, having once been used, it is valueless. The court dismissed the complaint in the *Mix* case and held that the patentee had granted without restriction or limitation the right to the defendant to make and sell to its customers this patented envelope. The Court also said that an employee who makes an invention of value in the work of his employer about which he is employed and invites his employer to engage in its manufacture for use and sale did not deny to his employer the right if exercised.

It is clear from the foregoing that the Appellee has an implied license under 35 U.S.C.A. 48 giving it the right to reproduce and use the subject forms without liability therefor.

XI. THE APPELLEE HAS A SHOP RIGHT UNDER THE PATENT IN SUIT.

A shop right is an irrevocable, non-exclusive, non-transferable license to use the invention which arises in an employee-employer relationship between the parties. *Hartley Pen Co. v. Lindy Pen Co., Inc., supra.*

The alleged invention was clearly made during the period that the appellant was employed by the appellee. (V. IV, pp. 495-497.) It related to his work. (V. IV, pp. 286-7, 497.) The appellee paid for the final usable product. (V. IV, p. 299.) These facts are not disputed.

The appellant states that he made the invention while on the sunny beaches of San Francisco and that he produced rough drawings of his proposed forms while at home and submitted them to his supervisor, Mr. Cambridge. (V. IV, pp. 286-7, 495-7.) Mr. Cambridge testified that the rough drawings were disclosed to him and that he discussed their application to the appellee's business with the appellant. (V. IV, pp. 287-8.)

This fact situation is identical to that in *Gill v. U. S.* (1896), 160 U.S. 426, 40 L. Ed. 480. Gill had

been employed as machinist, foreman, and draftsman at the Frankford Arsenal and later as master armorer. He was employed to perform manual labor and to exercise his mechanical skill in the service of the government, but was not hired to exercise his inventive genius. However, during his employment six patents relating to his work were issued to him. He sued the government for compensation for the use of the improvements he had patented. Gill tried to differentiate his case by showing that his invention, until it was reduced to paper, in the form of an intelligible drawing, was made during time which belonged to him and not on the time of the government. The cost of preparing the patterns for the iron and steel castings, and of preparing working drawings and of constructing the machines was borne exclusively by the government and several of the machines were made before an application for patent was made. The Court said:

> "* * * while the claimant used neither the property of the government, nor the services of its employees in conceiving, developing, or perfecting the inventions themselves, the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines themselves that were made in putting the inventions into practical use was borne by the government, the work being also done under the immediate supervision of the claimant."

The court felt that the distinction that the claimant tried to draw was too narrow to create a different

principle and hence the doctrine of shop right would still apply. The court went on to say:

> "The material fact is that, in both this and the *Solomons* case, the patentee made use of the labor and property of the government in putting his invention into the form of an operative machine, and whether such employment was in the preliminary stage of elaborating and experimenting upon the original idea, putting that idea into definite shape by patterns or working drawings, or finally embodying it in a completed machine, is of no consequence. In neither case did the patentee risk anything but the loss of his personal exertions in conceiving the invention."

It can be seen that the present case and the *Gill* case are substantially identical and that the appellee has a shop right under the patent in suit.

The appellant urged a contract but, as shown on page 53 of this brief, no contract ever existed, and the appellee's shop right remains effective as a bar to recovery in this action. It has been held that a demand for compensation does not create a contract and does not vitiate a shop right. *Wilson v. American Circular Loom Co.* (CCA 1, 1911), 187 U.S. 840.

XII. THE APPELLANT HAS FAILED TO PROVE DAMAGES.

Appellant is not in the business of manufacturing forms, has not licensed others to manufacture forms and has not shown any loss of sales, loss of profits, interference with his business nor any of the other matters from which damages customarily flow. Nor has the appellant attempted to do so; hence, no damages are due him. In *Coupe v. Royer* (1895), 155 U.S. 565, 582, the court said:

> "at law the plaintiff is entitled to recover, as damages, compensation for the pecuniary loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts—the measure of recovery in such cases being not what the defendant has gained, but what plaintiff has lost."

Appellant has only sought to show that there has been a savings to appellee by some mysterious decrease in the number of comptometer operators employed by appellee before and after the adoption of gummed strips. (V. III, p. 17.)

It was later brought out that simultaneously with the adoption of gummed strips there was a change of systems and appellant failed to show that any apportionment of savings, if any could be made. He failed in his burden and the problem of proving specific savings was never met face to face. Appellant's own testimony (V. III, pp. 111 to 122) clearly proves that if there was a saving, which is doubtful, it arose from a change of system which he did not invent and which was not patentable.

The alleged savings are too intangible and too remote from the adoption of the gummed strips to constitute a yardstick for damages in this action. Furthermore, it is conclusively shown that there were no savings. Note the testimony of Mr. Cambridge wherein he stated (V. IV, p. 292, lines 14-16 incl.):

> "Q. Can you state what the analysis showed with respect to increase or decrease in the number of comptometer operators?
>
> A. The account shows that there was an increase."

Mr. Cambridge's testimony is supported by the physical exhibits, Exhibits X and XI, which show that the number of comptometer operators, rather than being reduced by eight, was increased gradually despite the fact that there was a decrease in the number of stores being serviced by the central office.

It is respectfully submitted that appellant's unsupported charge that the use of gummed strips made possible the release of eight comptometer operators, is contrary to the testimony of his superior and is in conflict with the only records relating to the matter, that is, Exhibits X and XI which do not bear him out.

Since there is no showing as to what the appellant has lost from the alleged infringement and no showing that the appellee has profited, the appellant is not entitled to an award of damages based upon appellee's use.

XIII. AN ANALYSIS OF THE OPENING BRIEF OF PLAINTIFF-APPELLANT.

In our comments upon appellant's opening brief, we will use the same headings.

Jurisdictional Statement.

The court no doubt has jurisdiction of the cause and the parties.

Abstract of the Case.

It is respectfully submitted that appellant's "Abstract of the Case" is far too abstract and leaves a great deal to be desired due to its lack of completeness. Appellee has sought to correct the defects by putting in its brief a complete statement of the case as it applies to the defenses raised.

Factual Statement.

We believe that in his factual statement appellant's advocate drew all favorable inferences possible. Appellee believes, however, that it will be unnecessary to point out each of the instances where the inferences were drawn more favorably than justified, because it is appellee's contention that a study of the extrinsic evidence is not required by this court.

Appellee has sought to analyze undisputed evidence in conjunction with each of its particular defenses. It is respectfully submitted that the evidence which this court need examine, i.e. the patent in suit, is not in dispute and is clearly set forth in this brief.

The Invention.

Appellee has commented upon the paucity of explanation of the invention made by appellant and has enlarged upon the description earlier herein.

Specification of Error.

Appellee submits that appellant's specification of error is erroneous in that the trial court did not foreclose the jury from considering the case at bar. The jury deliberated for nine hours and did not return a verdict, whereupon the Honorable Judge Carter granted appellee's motion for judgment in accordance with motion for a directed verdict where no verdict was returned. Appellee has clearly set forth the propriety of granting such a motion under Rule 50(b).

The Scope of Evidence to Be Reviewed.

It is thought that appellant's arguments advanced under this heading are adequately answered and the pertinent evidence is reviewed by appellee.

The Essential Evidence.

There is no dispute between the parties as to the statements made under this heading by the appellant.

Damages.

The true picture concerning damages is set forth on pages 52 and 53 hereof. It is clear that appellant's wild assertions that he has been damaged in the amount of some $350,000.00 are absurd.

Issues Raised by Defendant's Answer.

In his argument under this heading appellant suggests that it is the appellee's obligation to point out the defenses which it raised in the lower court and the evidence required to support them. Appellant, however, urges that this is not an ordinary case of patent infringement but seeks to rely, in some way, upon the doctrine of a breach of confidential disclosure which, as pointed out earlier in this brief, he cannot do and which, during the pre-trial hearing, appellant agreed was improper. It was agreed that the matter of a confidential relationship has nothing to do with the matter of patent infringement. It is only pertinent to rebut a claim of license.

A confidential relationship does not create a valid patent nor does it create an admission of infringement. We have shown, however, in the analysis of appellee's defenses based upon statutory license and shop right, that there is no need to determine whether there was a confidential relationship or whether there was an agreement to pay.

The Iseri Patent.

This patent is discussed in detail on pages 31 to 34 of this brief and it is submitted that these comments show clearly how completely the Iseri patent anticipates the claims of the patent in suit.

The Graham Patent.

This patent is discussed in detail on pages 35 and 36 of this brief, and, as previously pointed out in

connection with Iseri, it is respectfully submitted that our prior comments show the pertinency of the Graham patent as an anticipatory reference.

The Bach Patent.

It is thought that the pertinency of the Bach patent is clearly pointed out earlier in this brief.

The reference to *Bianchi v. Barili* (CA 9, 1948), 168 F. 2d 793, relates to infringement and not to anticipation, and we are at a loss to understand its insertion.

The Pontiac Prior Use.

Appellee's comments earlier in this brief concerning the Pontiac Prior Use certainly show its pertinency:

The witness, Markham (V. III, p. 214) testified that when the strips were returned from the zone office to his company, there were certain recapitulations on the strips and that the designation of the month to which the information referred was at the top of each of the strips so that the "clerk in our organization who had to handle this would know to put January in January, and so on". Thus the clerk could put the proper strip in the proper column on the foundation sheet and have the indicia on the strip match the indicia on the foundation sheet. The matching indicia on the strip could then be removed, if desired, or it could be glued down to cover the matching indicia on the foundation form, and in the same manner as used by appellee to paste its strips as for example in Exhibits T 1 to T 11.

Safeway's Own Alleged Prior Use.

Appellee's prior comments in connection with its own prior use effectively dispose of appellant's arguments.

Appellant, on pages 22 and 23, comments upon the fact that appellee relied upon art other than art relied upon by the Patent Office. This point is clearly answered earlier in this brief and is disposed of entirely by Judge Fee's remarks in the case of *Jacuzzi Bros. v. Berkeley Pump Co., supra.*

On pages 24 and 25 of his brief, appellant refers to certain specific defenses, all of which appellee has referred to herein at appropriate places.

XIV. SUMMARY.

It is respectfully submitted that the Honorable District Court properly directed the verdict where no verdict was returned on the grounds that as a matter of law there was no evidence offered and received in the case which would justify a verdict in favor of the plaintiff-appellant and against said defendant-appellee, and that the evidence was legally insufficient to support a verdict in favor of the plaintiff-appellant.

In a patent case, the District Court and the Court of Appeals have a clear duty to measure the alleged invention of the patent in suit against the legal standards set up by the Supreme Court of the United

States regardless of whether or not the jury returned the verdict.

From the foregoing analysis of the patent in suit and of the prior art relied upon by the appellee, it is clear that the patent in suit fails to meet this standard of invention and must be held invalid as a matter of law.

It is also respectfully submitted that the patent in suit must be held not infringed by the appellee's forms as a matter of law because the appellee's forms clearly follow the prior art cited by the appellee.

In addition, appellee has established that it has a license under the patent in suit by way of a statutory license and a shop right.

Therefore, it is respectfully submitted that this Court should affirm the judgment of the District Court.

Dated, San Francisco, California,
August 27, 1954.

Respectfully submitted,
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No. 14,216

IN THE

United States Court of Appeals

For the Ninth Circuit

ALDEN HANSEN,

Plaintiff-Appellant,

vs.

SAFEWAY STORES, INCORPORATED,
a corporation,

Defendant-Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

FACTUAL CONFLICTS.

Appellee indicates substantial accord with the appellant's factual outline. Factual conflicts such as are raised by appellee will be considered as they arise.

In appellant's factual outline, however, we shall not endeavor to refer to all the evidence favoring appellant's position. Beyond the question of whether there was a substantial conflict in the evidence, the issue was for the trier of fact. No litigant has the right to expect this Honorable Court to devote itself to resolving factual issues, or to sift and weigh all the evidence. The law establishes the appropriate trier

of fact. As was crisply stated in *Jacuzzi Bros. Inc. v. Berkeley Pump Co. et al.,* 191 F. 2d 632, at page 634:

> "* * * If there is no firm adherence to such a rule, everything is cast adrift * * * Not only is there no finality, but the findings may change with shifting personnel or on subsequent hearings. Not only finality, but stability is lost. All is confusion."

(*Jacuzzi Bros. v. Berkeley Pump Co.* followed a *finding of fact* by the trial Court adverse to patentee with the result that this Honorable Court was faced merely with the problem of determining whether the finding had been supported by credible evidence.)

THE STANDARD OF INVENTION. GENERAL PRINCIPLES.

Appellee devotes considerable attention in its brief to unquestioned principles of law regarding function of court and jury. They will be discussed only insofar as their application to the facts of the instant case is involved.

Appellant respectfully invites Your Honors' attention to the fact that the Hansen patent was not issued after an administrative consideration, but after a judicial hearing. (*In re Hansen,* 154 F. 2d 684.)

AN INVENTION IS INTERPRETED IN THE LIGHT OF ITS FUNCTION.

An invention is a functional thing. If it has no function, it is not useful, and is not an invention. This rule applies not only to the absolute question of whether the patent has a function, but also, by comparison, to whether it has a function substantially in advance of the prior art.

We respectfully invite Your Honors' attention to the fact that *all* of appellee's arguments are directed to pointing out *physical* similarities between the Hansen patent and the prior art. These, perforce, are many. All are accounting forms. All contain straight lines; a plurality of columns; and a foundation sheet with strips to attach (with the possible exception of the Bach patent which is a Whist scoring coupon book). *Nowhere in appellee's brief is it suggested that any of the alleged prior art perform, or are capable of performing, the functions of the Hansen patent.*

In terms of usefulness and function, none compare, *nor are they claimed by appellee to compare,* with the Hansen patent. In terms of usefulness and function the Hansen patent not only rises above the prior art, *but it actually stands alone.*

The Hansen patent solves a problem neither solved nor attempted before. It accepts and recognizes the human element of error and lays a foundation whereby it may be discovered and corrected with great ease and without going through the entire material where the error is known to exist.

THE SIMPLE AND THE OBVIOUS.

Appellee states that no extrinsic evidence is required where the patent is "simple" and the comparisons are "obvious". We respectfully submit that appellee confuses "simple" with "obvious". They are not the same. To one in the position of exercising hindsight instead of foresight, simplicity is apt to be confused with obviousness, but the two are not synonymous. While obviousness before the fact may constitute evidence of lack of invention, simplicity which renders the invention obvious only *after the fact,* is not evidence of lack of invention. *In re Huff,* 1919 C.D. 152, states:

> "'Many things appear easy after they have been explained, and doubtless many a man has wondered why he failed to think of some apparently simple device or improvement that yielded a fortune to the one who did and revolutionized an industry. The simple fact is that the average person sees things as they are, and he who has originality of vision enabling him to visualize defects and the means of overcoming them should receive adequate reward.'"

Had the Hansen invention been "obvious" no doubt Safeway would have discovered and applied it before it was revealed to Safeway by Hansen.

Appellee states at page 10 of its brief that because the patent is simple, it does not rise to the dignity of invention. The cases cited by appellee do not support its proposition. On the contrary, the case of *Great Atlantic and Pacific Tea Co. v. Super Market*

Equipment Co. (1950), 340 U.S. 147, 71 D.Ct. 127, states the proper rule where combination patents are involved:

> "* * * The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable * * *"

(The *A. & P.* case involved nothing more than a change of dimensions.) Again, the test is functional. The tests were also specifically recognized in the other decisions cited by appellee. *Hunter Douglas Corporation v. Lando Products, Inc.* (decided August 18, 1954), 9 C.A.; *Berkeley Pump Co. v. Jacuzzi Bros., Inc.,* 102 U.S.P.Q. 100; *Himes v. Chadwick,* 9 C.A. 199 F. 2d 100; *Lunn v. F. W. Woolworth Co.,* 207 F. 2d 174.

In all of the above cited cases the principles of law were fully discussed and applied. *None* involved patents in which a new and better function was claimed as the Court points out in all the cases and by specific reference to testimony in *Berkeley Pump Co. v. Jacuzzi.*

Appellant respectfully invites Your Honors' attention to an article by the Honorable Clarence G. Galston, United States District Judge for the Eastern District of New York (13 F.R.D. 463), in which a careful and learned analysis of the pros and cons of this vexing problem of what constitutes invention,

as distinguished from mere skill in the calling, or the "obvious", is discussed.

In addition to the question of whether there are actually functional differences, the question remains, "Does the extent or degree of improvement or function rise to the dignity of invention."

Upon this question the evidence must, perforce, be general. The specific physical differences may be apparent and visual, but the decision as to degree must be general. We are, therefore, able only to refer Your Honors again to general principles:

> "As we have often repeated, in judging what required uncommon ingenuity, the best standard is when common ingenuity has failed for long to contrive under the same incentive."
>
> *Western States Machine Co. v. S. S. Hepworth Co.,* 147 F. 2d 345, 347.

> "The basis of that doctrine is that otherwise the mere skill of the art would normally have been called into action by the known want. The doctrine is authenticated by leading cases too numerous to mention."
>
> *Levin v. Coe,* 76 U.S. App. D.C. 347, 132 F. 2d 589, 596.

Indeed, what more cogent test could be applied in the question of what *could* be discovered as "obvious", than what *was* discovered as obvious? We ask Your Honors to bear in mind that Safeway *never* discovered the principles of the Hansen invention. It was revealed by Hansen, who was lured by promises Safe-

way never intended to honor (discussed in detail later in this brief).

(Appellee states in its brief that no question of confidential disclosure was involved. That is but a partial statement. It was merely conceded at the pretrial conferences that *damages* could not be based on fraud or unjust enrichment, particularly prior to the date of issue of the Hansen patent. (Hansen never claimed this.) The order was not intended to foreclose Hansen from enhancing the probative force of his evidence by showing that Safeway never came upon the principles of his invention except by his confidential disclosure of what they now maintain was "obvious".) (Vol. II, p. 15, line 20 through page 16, line 25.)

THE ALLEGED PRIOR USE.

Two alleged prior uses were urged by appellee. Both have already been disposd of by direct quotation from the trial record in appellant's opening brief (as to Pontiac forms), Volume IV, page 432, line 17 through page 433, line 2, on cross-examination of appellee's expert witness:

> "Mr. Bortin. Q. The teachings of this invention does not help in any way in locating errors once made?
>
> A. Not that I know of, I couldn't say.
>
> Q. The plaintiff's invention. The plaintiff's invention does, however, doesn't it?
>
> A. I think it could, yes.

Q. Well, as a matter of fact, it does definitely; there is no question about it, is there?

A. I have never worked the plaintiff's alleged invention. I assume it works the way it says in the patent; I think that is right."

And as to Safeway's own alleged prior use, its own employee on cross-examination testified (Volume III, page 253, lines 2-5):

"By Mr. Bortin. Q. Yes, there are columns there. The only relationship is the fact that you use glue and the fact that you use columns?

A. Yes."

THE ALLEGED PRIOR ART.

Three patents referred to by appellee in its brief are fully discussed in appellant's opening brief. They have been physically discussed in appellant's opening brief. None are claimed to perform the function of the Hansen patent. Appellee states that they were not before the Patent Office and the Court of Customs and Patent Appeals at the time the Hansen patent was issued. There is no justification for such a statement. As was stated in *Artmoore Co. v. Dayless Mfg. Co.*, 208 F. 2d 1:

"* * * It has been held, and we think with logic, that it is as reasonable to conclude that a prior art patent not cited was considered and cast aside because not pertinent, as to conclude that it was inadvertently overlooked."

Why, indeed, should they be considered if they do not perform the function of the Hansen patent?

In the consideration of the physical differences between the Hansen patent and the prior art, we respectfully call to your Honors' attention the language of *Bianchi v. Bianchi,* 168 F. 2d 793, 9 C.A., which points out that a patent that teaches merely an improvement in a familiar process merits a reasonably liberal construction. Indeed, if such were not the rule, the incentive offered to the imaginative by the United States for the public good would be substantially obliterated in any field where only improvement is possible.

Appellee states (page 64 of its brief) that, "The *reference to Bianchi v. Bianchi* (C.A. 9, 1948), 168 F. 2d 793, relates to infringement and not to anticipation, and we are at a loss to understand its insertion."

Quoting again from appellee's brief (page 34), the rule is correctly stated with ample supporting authority that, "It is well settled that that which infringes if later, would anticipate if earlier * * *" The tests are identical.

INFRINGEMENT.

Appellee stipulated that it used forms "substantially identical" with plaintiff's exhibit 2 in thirteen store areas throughout the United States. The dates of use are set out for the respective store areas in page 5 of appellant's opening brief. *Plaintiff's exhibit 2 is the exact form used upon presentation of the Hansen application in the United States Patent Office, as appears thereon.*

Over plaintiff's objection, Safeway, in the course of trial, introduced exhibits (T-1 through T-11) which were forms inconsistent with plaintiff's exhibit 2. The very most that may be said of defendant's exhibits T-1 through T-11 is that they raise a conflict in the evidence.

(Defendant's exhibits T-1 through T-11 were objected to at the trial as being inconsistent with its admitted use, and as hearsay since no witness testified to its use who could be cross-examined thereon. However, appellant did not specifically assign the ruling as error regarding said exhibit, preferring to concentrate on the fundamental issue.)

If anything may be said as a matter of law, it is that the evidence shows that Safeway *did* infringe the Hansen patent.

Appellee states (page 43), that it is agreed that Safeway exhibits (T-1 through T-11) are substantially identical to plaintiff's exhibit 2 (the form admittedly used by Safeway). This is a completely incorrect statement and is totally unsupported by the record. T-1 through T-11 are inconsistent with the forms to which appellee stipulated it used (plaintiff's exhibit 2), and were never seen by appellant prior to trial.

The entire argument of appellee as to non-infringement is bottomed upon the theory that T-1 through T-11 were the alleged infringing forms. The infringing form is plaintiff's exhibit 2, the use whereof was admitted both in the course of trial (Volume III,

page 137, line 18 through page 139, line 1), and in advance of trial (Volume I, page 3).

(Appellee states (page 19, appellee's brief) that the jury was unable to find the patent valid. There is no justification for this statement, and it is not the fact. The questions by the jury in the course of their deliberations indicated that they were confused by the conflict between the admitted use (plaintiff's exhibit 2), and the inconsistent forms (defendant's exhibit T-1 through T-11), introduced in the course of trial (Volume IV, page 544, line 6 through page 552, line 23).)

LICENSE.

Appellee next contends that Safeway used the Hansen invention prior to Hansen's application for his patent *with Hansen's knowledge and consent.*

We respectfully submit to your Honors' that, both in logic and equity, "with knowledge and consent" does not apply where the licensee gains consent through promise to compensate, and then, *after disclosure,* repudiates its promise. The courts do not encourage or sanction such conduct.

Talbert v. U. S., 1890, 25 Court of Claims, 1941, affirmed without comment on this point in 155 U.S. 45, 39 L. Ed. 64.

A promise made without the intention of performing it is fraud (California Civil Code section 1572(4)).

One who seeks to profit by his own fraud is not looked upon with favor by Courts of law.

The case of *Dable Grain Shovel Co. v. Flint,* 42 F. 686, cited by appellee, does not support appellee's proposition on the facts. In that case the invention was put into use by defendant before the patent was obtained and demand was made for compensation only after the patent had actually been obtained, as the Court noted that it was "* * * when he obtained the patents, *which must have been after they were applied for,* Dable demanded compensation. * * *"

Safeway knew full well Hansen was expecting compensation for his invention. It is shown not only by Hansen's specific demand by letter (plaintiff's exhibit 5), but also by the admission in the memorandum of Safeway (defendant's exhibit AL). Safeway never denied Hansen's right to compensation and Hansen testified that he had been promised compensation depending upon the value of his invention after a comparison of costs (Volume IV, page 483, lines 15-18).

At the trial Mr. Lingan Warren, president of Safeway, testified that it was against company policy to pay claims for improvements by way of extraordinary compensation. (Transcript, Volume IV, page 402 et seq.) That is not what Hansen was told when Safeway wanted, and bargained for, the use of his invention.

It is a strange concept of the fitness of things that causes Safeway to claim consent to use the invention, which consent was obtained by promises of compen-

sation which Safeway, *by its own showing,* never intended to honor.

* * * * * * *

> "No implied contract of license, arising from the circumstances under which the patent was taken out and the relations of the parties, can be set up in the face of a proved special contract of license." (*Sanitary Mfg. Co. v. Arrott,* 135 F. 750/758; *Hazen Mfg. Co. v. Wareham,* 242 F. 642.)

SHOPRIGHT.

Under the cases cited in appellee's brief it is clear, even from Safeway's own view of the facts, that there was no license or shopright. We ask your Honors to note the language of *United States v. Dubilier Condenser Corp.* (1933), 289 U.S. 178, cited in appellee's brief, which states in part:

> "On the other hand, if the employment be general, albeit it covers a field of labor and effort in the performance of which the employee conceived the invention for which he obtained a patent, the contract is not so broadly construed as to require an assignment of the patent. * * *"

The foregoing rule is uniformly followed. *Barton v. Nevada Consolidated Copper Co.,* 71 F. 2d 381, also cited by appellee, does not support appellee's proposition. It does, however, expound upon the law of license and shopright, from which it is made to appear that Safeway had neither license nor shopright.

(Appellee asks this Honorable Court to hold conclusively proved that Safeway never agreed to compensation. Notwithstanding Hansen's testimony to the contrary, the evidence upon which appellee bases this claim of conclusive proof is a self-serving memorandum for which no witness vouched (Volume IV, page 398, lines 15 et seq.), bearing only typewritten initials "AS" in lieu of a signature (defendant's exhibit AL).)

Hansen paid for all of the materials with which to work out his invention and he did so on his own time (Volume IV, page 483, lines 18-23). This is not denied by Safeway. We again invite your Honors' attention to the admissions of Mr. Cambridge, office manager for the San Francisco zone office (Volume IV, page 299, lines 2-20):

"Mr. Bortin. Q. Now, may I ask you one more question, Mr. Cambridge? Isn't it a fact that when you first saw Mr. Hansen's idea or patent it was in final form?

A. No.

Q. You deny that?

A. I deny that. We had to do a lot of printing.

Q. You did the printing?

A. We did the printing later.

Q. I am talking about the idea. The thought was worked out?

A. The idea was worked out, yes, a rough drawing.

Q. Yes.

A. That's right.

Q. You did the printing and you paid for the printing?

A. Yes.

Q. But the forms you printed you used for Safeway, didn't you?

A. Yes."

Gill v. U. S., 160 U.S. 426, cited by appellee, does not apply. There Gill was controlled by an estoppel *in pais,* under the facts as outlined by the Court, "* * * where an employee of the government takes advantage of his connection with it to introduce an unpatented device into the public service, giving no intimation at the time that he regards it as property or that he intends to protect it by letters patent, but allows the government to test the invention at its own exclusive cost and risk, by constructing machinery and bringing it into practical use before he applies for a patent, the law will not imply a contract; * * *"

DAMAGES.

The law fixes the measure of appellant's damages at "not less than a reasonable royalty." That is all he seeks.

The basis of Hansen's claim to a reasonable royalty, and what it would amount to, has already been fully covered in appellant's opening brief. In reply appellee states (page 60 of its brief) that "it is conclusively shown that there were no savings."

In support of this statement it refers to the testimony of Mr. Cambridge wherein he states that more comptometer operators were used.

In spite of the mass of contrary evidence as to the extensive use made of the Hansen invention, and periodic expansion thereof to other store areas throughout the United States (after Safeway claims to have discovered it to be of no value), this Honorable Court is asked to believe *conclusively* that there was no value to the Hansen invention because Safeway's own employee, beholden to Safeway for the very bread he eats, testifies that there was an increase in comptometer operators.

SUMMARY.

Appellant has endeavored, wherever possible, to point out to Your Honors where appellant's propositions are supported by Safeway's own evidence. A complete review of the entire record is more than we have the right to ask of this Honorable Court, notwithstanding our desire that the record be considered in as much detail as possible.

Every contention of Safeway's motion for judgment under rule 50(b) was bottomed upon issues of fact which, for the purposes of such a motion, are deemed adverse to appellee. We have, nevertheless, tried to state the evidence fairly, pointing out conflicts where they exist. We humbly suggest that such conflicts are all issues of fact, and the judgment rendered by the

Honorable United States District Court should be reversed with directions to grant a new trial.

Dated, San Francisco, California,
September 20, 1954.

Respectfully submitted,
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Attorney for Appellant.

No. 14,216

IN THE

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For the Ninth Circuit

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Plaintiff-Appellant,

vs.

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Defendant-Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable James Alger Fee, Walter L. Pope and James M. Carter, Judges of the United States Court of Appeals for the Ninth Circuit:

The appellee, feeling itself aggrieved by the opinion filed in this Court on June 27, 1956, petitions for a rehearing of the following propositions which are expressed or inherent in said opinion and which the appellee believes to be contrary to controlling authority or to the undisputed evidence.

I. *That the trial court permitted trial of collateral issues outside the scope of the pre-trial order.*

The Court's opinion states that "the trial of various collateral issues got the jury into difficulty," that the question of Safeway's "technical shop right . . . and

a great many (other) extraneous issues were tried," and that "the trial was not confined to the matters set out in the pre-trial order." Petitioner respectfully suggests and will later show that the Court has substantially misinterpreted the terms of the pre-trial order in question.

II. *That where issues are limited by pre-trial order, the admission of evidence on additional issues is error despite the failure of either party to complain of the deviation.*

The Court's opinion maintains that the trial of issues purportedly outside the scope of the pre-trial order "was a basic error," presumably justifying reversal. Petitioner suggests that controlling authority, cited below, is clearly to the contrary.

III. *That appellate review must be limited to the issues expressly outlined in the pre-trial order, despite full trial of other issues.*

Despite full presentation of evidence on the defenses of lack of infringement, statutory license, and shop right, this Court has restricted its review to the sole issue of validity of the patent, apparently believing itself bound by its restricted interpretation of the pre-trial order. Petitioner suggests that such a limited review is highly prejudicial to it, and that a decision correct on any grounds must be affirmed.

IV. *That the issuance of a patent raises a presumption of validity which constitutes evidence sufficient to require submission of the issue of validity to the jury and to foreclose a directed verdict.*

The Court's opinion insists that there was "a strong presumption of validity" arising from the issuance of the patent by the Patent Office, that "the ruling of the Court of Customs and Patent Appeals adds great weight to the presumption . . .", and that the trial court's "balancing of this presumption against the anticipatory references was . . . a finding of fact." Petitioner suggests that under controlling authority, analyzed in detail below, any such presumption disappears where pertinent prior art was not considered, and that in the face of clear proof of lack of invention the so-called presumption does not prevent a directed verdict or a judgment notwithstanding the verdict.

V. *That novelty and utility alone are sufficient to support a finding of validity of a patent despite a clear lack of invention.*

The Court's opinion states as a legal proposition that where old elements are combined "a combination of such elements will still amount to invention if it performs a new and useful function." Such a statement must be based on the assumption that there is evidence in the record that the Hansen device is a *new* combination of old elements, performing a *new* and useful function over the prior art. Petitioner suggests that both the legal proposition and the factual assumption are in error, in view of the record and the controlling authorities.

ARGUMENT.

I. JUDGE CARTER'S PRE-TRIAL ORDER ENCOMPASSED RATHER THAN ELIMINATED SAFEWAY'S DEFENSES OF NON-INFRINGEMENT, "STATUTORY LICENSE", AND "SHOP-RIGHT".

The Court of Appeals has interpreted the pre-trial order contrary to the interpretation given it by both parties and the trial court. Thereby the appellate court has wiped out basic defenses pleaded by Safeway and tried by the parties and the trial court in accordance with their unanimous understanding of the pre-trial order.

The record is clear. Vol. II, p. 12, that the pre-trial order was intended solely to limit plaintiff's case in chief. It was not intended to, and does not in terms, limit Safeway's right to present its defenses that the patent, if valid, was not infringed either because (1) of Safeway "statutory license" or "shop-right", or (2) otherwise. Petitioner respectfully draws to the attention of the Court the following discussion between Judge Carter and counsel for the plaintiff:

Mr. Bortin. ". . . we felt that one of their defenses, which is shop right, and other factors in the case, may raise an estoppel . . ."

The Court. "You have the right to meet that . . . Such an order wouldn't foreclose you from meeting that."

If the plaintiff had the right under the pre-trial order to rebut the defenses of non-infringement, statutory license, and shop right, can it be seriously contended that defendant had no right under the

order to raise such defenses? See also Record Vol. II, p. 13 line 25 to p. 14 line 4, wherein the Trial Judge recognizes that the pre-trial order was not intended to limit presentation of matters of defense.

Non-infringement in all of its aspects was clearly an issue reserved in the pre-trial order. Consequently, the subsequent admission of evidence on these issues —without objection—was not in violation of the pre-trial order.

Surely the appellate court must accept the construction placed upon the pre-trial order by the trial court and the parties. Especially is this true where the appellate court's construction serves to eliminate basic defenses appropriately pleaded and tried.

II. EVEN IF PRE-TRIAL ORDER BE STRICTLY CONSTRUED, RECEPTION OF EVIDENCE ON ISSUES OUTSIDE PRE-TRIAL ORDER CONSTITUTES AN INFORMAL AMENDMENT OF THE ORDER, WITHIN THE SOUND DISCRETION OF THE TRIAL COURT, AND CANNOT BE CONSIDERED AS ERROR.

As a fundamental basis of its reversal the Court of Appeals has held that it is "basic error" and beyond the power of the trial court and the parties to amend a pre-trial order by mutual agreement. The appellate court has made this startling holding without receiving any argument on it—oral or written. Controlling authority is to the contrary.

Bucky v. Sebo, 208 F. 2d 304 (2d C.A. 1953);
Sartori v. U.S., 186 F. 2d 679 (10th C.A. 1950);
Mayfield v. First Nat. Bank of Chattanooga, 137 F. 2d 1013 (6th C.A. 1943);

Cf.

Smith Contracting Corp. v. Trojan Const. Co., 192 F. 2d 234 (10th C.A. 1951);

3 Moore's Fed. Practice, p. 1132: "Failure formally to amend the pre-trial order is not error when the Court admits evidence to the same extent as if the order had been amended."

See also:

Montgomery Ward and Co. v. Northern Pacific Terminal Company of Ore., 17 F.R.D. 52 (D. Ore. 1954), wherein Fee, J. held, at p. 54, that a pre-trial order is an "extension of the formal complaint . . ." If this be true, it is equally subject to amendment to conform to proof in accord with Fed. Rule 15(b), as noted in the *Sebo* case, *supra.*

III. AN APPELLATE COURT MUST REVIEW A JUDGMENT IN THE LIGHT OF THE ENTIRE CASE RATHER THAN ON LIMITED GROUNDS CITED BY THE TRIAL COURT—A DECISION CORRECT ON ANY GROUNDS MUST BE AFFIRMED.

A. The question on appeal is always whether the judgment of the lower court was correct, not whether the reasons given for the judgment are valid.

Davis v. Packard, 31 U.S. 41, 8 L. Ed. 312 (1832);

Stoody Co. v. Mills Alloys Inc., 67 F. 2d 807 (9th C.A. 1933);

Eureka County Bank v. Clarke, 130 Fed. 325 (9th C.A. 1904).

The judgment of the trial court recited that as a matter of law there was no evidence which would justify a verdict in favor of plaintiff. If any of the defenses raised by Safeway are uncontroverted, as a matter of law, the verdict must be affirmed; the appellate court cannot properly limit its review to the issue of validity of the patent noted in the trial court's "memorandum for judgment."

B. A trial court decision correct on any grounds must be affirmed.

Brown v. Allen, 73 S. Ct. 397, 408; 344 U.S. 443; 97 L. Ed. 469 (1953);

Helvering v. Gowran, 58 S. Ct. 154; 302 U.S. 238; 82 L. Ed. 224 (1937);

Bucky v. Sebo, 208 F. 2d 304 (2d C.A. 1953);

Commissioner of Internal Revenue v. Stimson Mill Co., 137 F. 2d 286 (9th C.A. 1943);

McGivern v. Northern Pac. Ry. Co., 132 F. 2d 213 (8th C.A. 1942).

The judgment of the trial court directing a verdict for the defendant was correct, not only on grounds of the invalidity of the patent as a matter of law, but also on the ground of the lack of infringement as a matter of law because of the defendant's statutory license or shop-right, or because of basic differences between plaintiff's device and the devices used by defendant. The appellate court cannot properly reverse solely on the ground that a question of fact existed as to the issue of the patent's validity.

IV. THE PRESUMPTION OF VALIDITY OF A PATENT DOES NOT RAISE AN ISSUE OF FACT REQUIRING SUBMISSION TO A JURY AND FORECLOSING A DIRECTED VERDICT IRRESPECTIVE OF OTHER EVIDENCE OF INVALIDITY.

A. Where pertinent prior art was not considered by the patent office or the Court of Customs and Patent Appeals, the presumption of validity disappears or is largely dissipated.

Fritz W. Glitsch & Sons, Inc. v. Wyatt Metal & Boiler Wks., 224 F. 2d 331 (5th C.A. 1955);

Jacuzzi Bros. v. Berkeley Pump Co., 191 F. 2d 632 (9th C.A. 1951);

Gomez v. Granat Bros., 177 F. 2d 266 (9th C.A. 1949);

Hughes v. Salem Co-operative Co., 137 F. Supp. 572 (W.D. Mich. 1955).

The record is clear, Vol. IV, pp. 341-367, Appellee's Brief, pp. 31-39, that the Iseri, Graham, and Bach patents, and the prior use by Pontiac Motor Car Co. and by defendant-appellee, were not considered by the Patent Office or by the Court of Customs and Patent Appeals, and that if they had been considered, the Court would not have ordered the Hansen patent to be issued.

B. The general presumption of validity of an administrative decision does not of itself raise a genuine issue of material fact requiring submission of the issue to a jury; the presumption is rebuttable

and disappears upon the introduction of clear and undisputed evidence contrary thereto.

U.S. Air Cond. Corp. v. Governair Corp., 216 F. 2d 430 (10th C.A. 1954);

Hygrade Food Prod. Corp. v. R.F.C., 196 F. 2d 738 (U.S. Em. Ct. of App. 1952);

Harlan Taxi Assn. v. Nemesh, 191 F. 2d 459 (D.C.C.A. 1951);

J. R. Watkins Co. v. Raymond, 184 F. 2d 925 (8th C.A. 1950);

Gillette's Estate v. Comm., 182 F. 2d 1010 (9th C.A. 1950);

Traders & Gen. Ins. Co. v. Powell, 177 F. 2d 660 (8th C.A. 1949).

C. Lacking substantial independent evidence of validity, the trial court may properly rule that a defendant has met the burden of proving invalidity as a matter of law, despite the presumption, and direct a verdict in defendant's favor.

Vermont Structural Slate Company v. Tatko Brothers Slate Company, 233 F. 2d 9 (2d C.A. 1956);

Bobertz v. General Motors Corp., 228 F. 2d 94 (6th C.A. 1955);

Berkeley Pump Co. v. Jacuzzi Bros., 214 F. 2d 785 (9th C.A. 1954);

United Mattress Mach. Co. v. Handy Button Mach. Co., 207 F. 2d 1 (3rd C.A. 1953);

Packwood v. Briggs & Stratton Corp., 195 F. 2d 971 (3rd C.A. 1952).

Cf. The following cases, reversing judgments of validity, thereby holding patents invalid as a matter of law, despite presumption:

Great A & P Tea Co. v. Supermarket, 71 S. Ct. 127 (1950);

Powder Power Tool Corp. v. Powder Actuated Tool Co., 230 F. 2d 409 (7th C.A. 1956);

Fritz W. Glitsch & Sons, Inc. v. Wyatt Metal & Boiler Wks., 224 F. 2d 331 (5th C.A. 1955);

Kwikset Locks v. Hillgren, 210 F. 2d 483 (9th C.A. 1954);

U.S. Air Cond. Corp. v. Governair Corp., 216 F. 2d 430 (10th C.A. 1954);

General Motors v. Estate Stove Corp., 203 F. 2d 912 (6th C.A. 1953);

Cont. Farm Eq. Co. v. Love Tractor, 199 F. 2d 202 (8th C.A. 1952);

Lane-Wells Co. v. Johnston, 181 F. 2d 707 (9th C.A. 1950).

The trial court in this case properly ruled that, under the controlling definitions of a patentable invention, plaintiff failed to present substantial evidence of validity and defendant proved invalidity as a matter of law.

V. TO BE PATENTABLE A DEVICE MUST INVOLVE "INVENTION" AS WELL AS "NOVELTY" AND "UTILITY".

A. Although a combination of old elements must perform a new and useful function to be patentable, this requirement satisfies only the criteria of "nov-

elty" and "utility"; the device must also achieve the status of "invention" to be a valid patent.

Application of Lawson, 228 F. 2d 249 (Ct. of Cus. & Pat. App. 1955);

Application of Backhouse, 220 F. 2d 283 (Ct. of Cus. & Pat. App. 1955);

Hycon Mfg. Co. v. Koch & Sons, 219 F. 2d 353 (9th C.A. 1955);

Pollard v. Amer. Phenolic Corp., 219 F. 2d 360 (4th C.A. 1955);

Buffalo-Springfield Co. v. Galion, 215 F. 2d 686 (6th C.A. 1954);

Allied Wheel Prod. v. Rude, 206 F. 2d 752 (6th C.A. 1953);

Palmer v. Kaye, 185 F. 2d 330 (9th C.A. 1949);

Gomez v. Granat Bros., 177 F. 2d 266 (9th C.A. 1949);

Schick Serv. Inc. v. Jones, 173 F. 2d 969 (9th C.A. 1949).

The trial court correctly adhered to controlling law in this and other circuits that a device must not only be novel and useful, but also constitute an "invention", and correctly held that plaintiff's device did not constitute a patentable invention.

B. Mere performance of a new and useful function by a combination of old elements does not amount to invention unless the result is unexpected and unobvious—the achievement of the inventive faculty.

Powder Power Tool Corp. v. Powder Actuated Tool Co., 230 F. 2d 409 (7th C.A. 1956);

Application of Shaffer, 229 F. 2d 476 (Ct. of Cus. & Pat. App. 1956);

Application of Tatincloux, 228 F. 2d 238 (Ct. of Cus. & Pat. App. 1955);

Bobertz v. General Motors, 228 F. 2d 94 (6th C.A. 1955);

Pierce v. Muehlsisen, 226 F. 2d 200 (9th C.A. 1955);

Hunter-Douglas Corp. v. Lando Products, 215 F. 2d 372 (9th C.A. 1954);

Kwikset Locks v. Hillgren, 210 F. 2d 483 (9th C.A. 1954);

Himes v. Chadwick, 199 F. 2d 100 (9th C.A. 1952);

Photochart v. Photo Patrol, 198 F. 2d 625 (9th C.A. 1951).

There is no evidence whatsoever that any new or useful result achieved by the Hansen device was to any extent or degree unexpected or unobvious in view of the prior art. On the contrary, in view of said prior art not considered by the Patent Office or the Court of Customs and Patent Appeals, but brought to the attention of the trial court, any result achieved by the Hansen device was purely the result of mechanical skill, easily achieved by one skilled in the art and having knowledge of the prior art.

C. The uncontradicted evidence shows that the Hansen device is not a combination of previously uncombined elements, but is a substantial duplicate of several examples of prior art devices; in such a case where all elements can be found in a single prior structure, doing the same work in substantially the same manner, there can be no "invention" even though the device performs a new and useful func-

tion, since a mere change in result or function with no substantial change in structure or form can never constitute a patentable "invention."

Application of Lawson, 228 F. 2d 249 (Ct. of Customs & Patent Appeals 1955);

Application of Ducci, 225 F. 2d 683 (Ct. of Cus. & Pat. App. 1955);

Kruger v. Whitehead, 153 F. 2d 238 (9th C.A. 1946);

Lempco Products v. Timpken-Detroit Axle, 110 F. 2d 307 (6th C.A. 1940).

The Hansen device does not even rise to the dignity of a "combination patent", in the sense of a combining of old elements in a new combination. Each of the four elements claimed by Hansen are found in substantially the same combination in Iseri, Graham and Bach patents, and in the Pontiac prior use. Record Vol. IV, pp. 459-470. The Hansen device is merely a combination of elements that were already existing in each of several prior patents or prior uses brought to the attention of the trial court. Therefore, irrespective of how unexpected or unobvious was the new function or use to which Hansen put his device, the substantial similarity in structure alone is sufficient to negate "invention" as a matter of law.

VI. CONCLUSION.

For the reasons above set forth, appellee respectfully submits that its petition for a rehearing should be granted.

Dated, San Francisco, California,
August 15, 1956.

Respectfully submitted,
FLEHR AND SWAIN,
PAUL D. FLEHR,
JOHN F. SWAIN,
Attorneys for Safeway Stores, Incorporated, Appellee and Petitioner.

GEORGE H. JOHNSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
August 15, 1956.

JOHN F. SWAIN,
Of Counsel for Appellee and Petitioner.

No. 14217

United States
Court of Appeals
for the Ninth Circuit

L. GLENN SWITZER, IDA H. SWITZER, HOWARD A. SWITZER and FLORENCE M. SWITZER, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

JOHN I. BOLEN, C.P.A.,
OWEN E. O'NEIL, Esq.,
LOUIS T. FLETCHER, Esq.,
ALVA C. BAIRD, Esq.,
WM. A. CRUIKSHANK, Esq.

For Respondent:

R. E. MAIDEN, JR., Esq.

DOCKET ENTRIES

1950

May 15—Petition received and filed. Taxpayer notified. Fee paid.

May 16—Copy of petition served on General Counsel.

May 15—Request for Circuit hearing in Los Angeles, Calif. filed by taxpayer. 5/18/50—Granted.

July 3—Answer filed by General Counsel.

July 11—Copy of answer served on taxpayer. Los Angeles, Calif.

1951

Nov. 21—Hearing set February 4, 1952, Los Angeles, Calif.

1952

Jan. 14—Motion for leave to amend answer, amended answer lodged, filed by General Counsel. 1/15/52—Granted.

1952

Jan. 15—Motion for continuance, filed by taxpayer. Granted.

Jan. 25—Hearing set April 14, 1952—Los Angeles, Calif.

Feb. 13—Entry of appearance of Owen E. O'Neil as counsel filed.

Feb. 13—Entry of appearance of Louis T. Fletcher, as counsel filed.

Feb. 26—Reply to amended answer filed by taxpayer. Copy served 2/27/52.

Mar. 25—Amendment to hearing notice.

Apr. 3—Motion for leave to amend amended answer, amendment to amended answer lodged, filed by General Counsel.

Apr. 4—Motion for leave to amend amended answer granted, amendment filed. 4/7/52 Copy served.

Apr. 17-18—Hearing had before Judge Rice on merits, petitioner's oral motion to vacate granted motion for leave to file amendment to amended answer, denied. Petitioner's oral motion to consolidate with dockets 28257, 28258 and 28259 granted. Petitioner's motion to dismiss asserted fraud and negligence penalties is denied. Entry of appearance of Alva C. Baird and Wm. A. Cruikshank, Jr., Stipulation of facts, motion to dismiss and reply to amendment to amended answer all filed at hearing. Respondent's brief, 7/17/52; Pe-

1952

Apr. 17-18 (cont) titioner's Brief, 9/2/52; Respondent's reply, 10/2/52.

Apr. 30—Petitioner's reply served on General Counsel.

May 1—Transcript of Hearing 4/17/52 filed.

July 16—Brief filed by General Counsel.

Aug. 27—Motion for extension to Sept. 15/52 to file reply brief filed by taxpayer—Granted.

Sept. 11—Motion for extension to Sept. 30, 1952 to file reply brief filed by taxpayer—Granted.

Sept. 30—Brief filed by taxpayer. 10/1/52 Copy served.

Oct. 10—Motion to amend brief by substituting pages 3 and 4 filed by taxpayer. 10/10/52 —Granted.

Nov. 6—Motion for leave to file memorandum supplementing brief. Memorandum brief lodged, filed by taxpayer. 11/6/52—Granted. 11/7/52 Copy served.

1953

June 30—Findings of fact and opinion rendered. Judge Rice. Decision will be entered under Rule 50. 7/2/53 Copy served.

Sept. 30—Agreed computation filed.

Oct. 5—Decision entered. Judge Rice. Div. 12.

1954

Jan. 4—Petition for Review by U. S. Court of Appeals for the Ninth Circuit filed by taxpayer.

Jan. 4—Affidavit of service by mail, of petition for review, filed.

1954

Jan. 11—Designation of Record on Appeal, filed by petitioner.

Jan. 11—Proof of service of Designation of Record filed.

The Tax Court of the United States

Docket No. 28256

L. GLENN SWITZER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated February 24, 1950, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual whose address is 3464 East Foothill Boulevard, Pasadena 8, California. The returns for the periods here involved were filed with the Collector of Internal Revenue for the Sixth Collection District of California at Los Angeles.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on February 24, 1950.

3. The taxes in controversy are individual in-

come taxes for the calendar years 1944 and 1945, in the amounts of $1,971.17 and $10,604.04, respectively, or a total of $12,575.21, for both years.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in asserting and deficiency in petitioner's income taxes for the taxable year 1944 at a time when he was barred from assessing such taxes by Section 275(a) of the Internal Revenue Code.

(b) The Commissioner erred in asserting any deficiency in petitioner's income taxes for the taxable year 1945 at a time when he was barred from assessing such taxes by Section 275(a) of the Internal Revenue Code.

(c) The Commissioner erred in determining there were omitted from the gross income reported in petitioner's Federal Income Tax Return for the taxable year 1944 items of income, properly includible in gross income for said year, in excess of twenty-five (25%) percent of the gross income reported in said return.

(d) The Commissioner erred in determining there were omitted from the gross income reported in petitioner's Federal Income Tax Return for the taxable year 1945 items of income, properly includible in gross income for said year, in excess of twenty-five (25%) percent of the gross income reported in said return.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner's Federal Income Tax Return for the taxable year 1944 was filed with the Collector at Los Angeles, California on or before March 15, 1945. A notice of deficiency (a copy of which is attached as Exhibit A hereto, dated February 24, 1950), was mailed to the taxpayer more than three years after said return was filed. Therefore, no assessment of the alleged deficiency in petitioner's income taxes for the year 1944 could then be made. The Commissioner is barred by the Period of Limitation upon assessment as provided in Section 275(a) of the Internal Revenue Code.

(b) Petitioner's Federal Income Tax Return for the taxable year 1945 was filed with the Collector at Los Angeles, California on or before March 15, 1946. A notice of deficiency (a copy of which is attached as Exhibit A hereto, dated February 24, 1950), was mailed to the taxpayer more than three years after said return was filed. Therefore, no assessment of the alleged deficiency in petitioner's income taxes for the year 1945 could then be made. The Commissioner is barred by the Period of Limitation upon Assessment as provided in Section 275(a) of the Internal Revenue Code.

(c) In petitioner's income tax return for the year 1944, petitioner reported all of his gross income for said year. There were not omitted from gross income items includible therein in excess of twenty-

five (25%) percent of the gross income as reported, as asserted by the Commissioner. No part of the petitioner's gross income was omitted from the said return. The provisions of Section 275(c) of the Internal Revenue Code are therefore inapplicable.

(d) In petitioner's income tax return for the year 1945, petitioner reported all of his gross income for said year. There were not omitted from gross income items includible therein in excess of twenty-five (25%) percent of the gross income as reported, as asserted by the Commissioner. No part of the petitioner's gross income was omitted from the said return. The provisions of Section 275(c) of the Internal Revenue Code are therefore inapplicable.

Wherefore, the petitioner prays that this Court hear the case and determine that there is no deficiency in petitioner's income taxes that is due or that may now be assessed for either of the taxable years involved in this proceeding.

/s/ JOHN I. BOLEN,
Counsel for Petitioner

State of California,
County of Los Angeles—ss.

L. Glenn Switzer, being first duly sworn, says that he is the petitioner above named: that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true.

/s/ L. GLENN SWITZER

Subscribed and sworn to before me this 12th day of May, 1950.

[Seal] /s/ LOUIS T. FLETCHER,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT A

Treasury Department, Internal Revenue Service,
417 So. Hill St., Los Angeles 13, Calif.

Office of Internal Revenue Agent in Charge, Los Angeles Division—LA:IT:90D:LHP

Mr. L. Glenn Switzer Feb. 24, 1950
3464 E. Foothill Blvd., Pasadena 8, Calif.

Dear Mr. Switzer:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1944 and 1945 discloses a deficiency of $12,575.21, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of the letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Internal Revenue Agent in Charge, Los Angeles 13, California, for the attention of LA: Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner
/s/ By GEORGE D. MARTIN,
Internal Revenue Agent in Charge

Enclosures: Statement, Form of Waiver.

Statement

LA:IT:90D:LHP

Tax Liability for the Taxable Years Ended December 31, 1944 and 1945

Year	Deficiency
1944 Income tax	$ 1,971.17
1945 Income tax	10,604.04
Total	$12,575.21

This determination of your income tax liability has been made upon the basis of information on file in this office.

Inasmuch as there was omitted from the gross income reported in your returns for the taxable years 1944 nd 1945 items of income, properly includible in gross income, in excess of 25 per centum of the gross income reported in your returns, the deficiency of income tax shown herein has been asserted in accordance with the provisions of section 275(c) of the Internal Revenue Code.

The following adjustments to the ordinary net income of the Transit Mixed Concrete Company, a partnership, for its taxable years ended December 31, 1944 and December 31, 1945, are based upon an audit made of the books of the partnership and result in an increase of your share thereof as shown below:

	1944	1945
Ordinary net income as disclosed by partnership return	$13,936.73	$15,332.71
Additional income:		
California-Portland Cement Co.—special discounts	6,082.29	19,265.66
Discounts not taken by customers	4,152.63	17,249.20
Sales tax omitted on invoices	20,864.23	36,776.34
Unidentified items	1,872.98	1,872.96
Corona Nov. Dec. sales omitted	.....	17,298.31
Total	$46,908.86	$107,795.18
Nontaxable income:		
Hollywood cash sales entered twice	14,661.50	26,442.09
Ordinary net income adjusted	$32,247.36	$81,353.09
Your distributive share	$21,498.23	$54,235.40
Amount reportable in your separate return	$10,749.11	$27,117.70
Amount reported	4,645.58	5,110.91
Increase	$ 6,103.53	$22,006.79

ADJUSTMENTS TO INCOME

Taxable Year Ended December 31, 1944

Adjusted gross income as disclosed by return	$ 4,645.58
Additional income:	
(a) Income from partnership increased	6,103.53
Adjusted gross income as corrected	$10,749.11
Allowable deduction:	
(b) Standard deduction	500.00
Net income determined	$10,249.11

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained.

(b) Your adjusted gross income, as corrected herein, is in excess of $5,000.00 and your tax liability is therefore computed

under the provisions of sections 11 and 12 of the Internal Revenue Code, in lieu of section 400, as elected in your return. You are, however, allowed the standard deduction of $500.00 provided in section 23(aa)(1) of the Internal Revenue Code.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1944

Net income determined	$10,249.11	
Less: Surtax exemption	500.00	
Surtax Net income	$ 9,749.11	
Surtax		$ 2,554.70
Net income determined	$10,249.11	
Less: Normal-tax exemption	500.00	
Net income subject to normal tax	$ 9,749.11	
Normal tax at 3%		292.47
Correct income tax liability		$ 2,847.17
Income tax liability shown on return, account No. 2410429		876.00
Deficiency of income tax		$ 1,971.17

ADJUSTMENT TO NET INCOME

Taxable Year Ended December 31, 1945

Net income as disclosed by return	$ 4,610.91
Additional income:	
(a) Income from partnership increased	22,006.79
Net income adjusted	$26,617.70

EXPLANATION OF ADJUSTMENT

(a) This adjustment has been previously explained.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1945

Net income adjusted	$26,617.70	
Less: Surtax exemption	500.00	
Surtax net income	$26,117.70	
Surtax		$10,812.97
Net income adjusted	$26,617.70	

Less: Normal-tax exemption	500.00	
Net income subject to normal tax	$26,117.70	
Normal tax at 3%		783.53
Correct income tax liability		$11,596.50
Income tax liability shown on return, account No. 7644737		992.46
Deficiency of income tax		$10,604.04

[Endorsed]: T.C.U.S. Filed May 15, 1950.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4(a) to (d), inclusive. Denies the allegations of error contained in subparagraphs (a) to (d), inclusive, of paragraph 4 of the petition.

5(a). Admits that the petitioner's Federal income tax return for the taxable year 1944 was filed with the Collector of Internal Revenue at Los Angeles, California, on March 15, 1945, and admits that the notice of deficiency was mailed to the petitioner on February 24, 1950; denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that the petitioner's Federal income tax return for the taxable year 1945 was filed on March 15, 1946, and admits that the notice of deficiency was mailed to the petitioner on February 24, 1950; denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) and (d). Denies the allegations contained in subparagraphs (c) and (d) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. Neblett, Division Counsel.

E. C. Crouter, R. H. Kinderman, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed July 3, 1950.

[Title of Tax Court and Cause.]

AMENDED ANSWER

The Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4(a) to (d), inclusive. Denies the allegations of error contained in subparagraphs (a) to (d), inclusive, of paragraph 4 of the petition.

5(a). Admits that the petitioner's Federal income tax return for the taxable year 1944 was filed with the Collector of Internal Revenue at Los Angeles, California, on March 15, 1945, and admits that the notice of deficiency was mailed to the petitioner on February 24, 1950; denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that the petitioner's Federal income tax return for the taxable year 1945 was filed on March 15, 1946, and admits that the notice of deficiency was mailed to the petitioner on February 24, 1950; denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) and (d). Denies the allegations contained in subparagraphs (c) and (d) of paragraph 5 of the petition.

6. Denies each and every allegation contained in

the petition not hereinbefore specifically admitted or denied.

Further answering, respondent alleges:

7. That the income tax returns filed by the petitioner for the years 1944 and 1945 reported net taxable income and taxes due in the following amounts:

	Reported Taxable Net Income	Reported Taxes Due
1944	$4,645.58	$876.00
1945	4,610.91	992.46

8. That the Commissioner of Internal Revenue erroneously determined the net taxable income and deficiency in taxes due from petitioner for the years 1944 and 1945 in a notice of deficiency dated February 24, 1950, to be:

	Net Taxable Income	Deficiency
1944	$10,249.11	$ 1,971.17
1945	26,617.70	10,604.04

9. That the correct net taxable income and deficiencies in taxes due from the petitioner for the years 1944 and 1945 are set forth below:

	Correct Net Taxable Income	Correct Deficiency
1944	$10,975.26	$ 2,258.86
1945	27,342.11	11,074.91

10. That, therefore, there are due and owing increased deficiencies from the petitioner for the years 1944 and 1945 which are hereby asserted and claimed in the following amounts:

	Increase in Deficiency
1944	$287.69
1945	470.87

11. That during the years 1944 and 1945 petitioner received net taxable income in excess of the amounts set forth in paragraph 7, and which amounts he knowingly and fraudulently failed and refused to report, acknowledge, or disclose the taxes due thereon, and all the facts and information regarding the receipt of said unreported amounts of income, which said unreported amounts resulted in the correct net taxable income and deficiencies set forth in paragraph 9.

12. That, accordingly, there are due, and there are hereby claimed from the petitioner for the years 1944 and 1945, the deficiencies as set forth in paragraph 9, which include the increased deficiencies asserted and claimed in paragraph 10, and the 50% fraud penalties in the amounts as follows:

	50% Penalty
1944	$1,029.53
1945	5,537.46

13. That the said income tax returns for 1944 and 1945 which were filed by the petitioner are false and fraudulent and were prepared and filed with intent to evade tax and, therefore, the said deficiencies referred to in paragraph 9 and paragraph 10 for the years 1944 and 1945 are due to fraud with intent to evade the true and correct taxes due from the petitioner for the said taxable years.

Wherefore, respondent prays that the Court determine the deficiencies and penalties involved

herein to be the amounts determined by the Commissioner.

/s/ MASON B. LEMING,
Acting Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. Neblett, Division Counsel.

R. E. Maiden, Jr., W. Lee McLane, Jr., Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed January 15, 1952.

[Title of Tax Court and Cause.]

REPLY

The above named petitioner, in reply to the allegations set forth by the respondent in his amended answer, admits, denies and alleges as follows:

7. Admits the allegations contained in paragraph 7 of the amended answer.

8. Admits the allegations contained in paragraph 8 of the amended answer.

9. Admits the amount of correct net taxable income set forth in paragraph 9 of the amended answer, but denies the correctness of the deficiencies therein stated, and further denies that any deficiency is due from or owing by the petitioner for either of the years referred to.

10. Denies the allegations contained in paragraph 10 of the amended answer.

11. Admits that during the years 1944 and 1945 petitioner received net taxable income in excess of the amounts set forth in paragraph 7, and denies the remaining allegations contained in said paragraph 11.

12. Denies the allegations contained in paragraph 12 of the amended answer.

13. Denies the allegations contained in paragraph 13 of the amended answer.

In further reply to the amended answer, petitioner alleges:

14. That the facts alleged by respondent in his amended answer relating to fraud or intention to evade tax on the part of petitioner are erroneous; that there is no deficiency in tax due from petitioner for either of the years 1944 or 1945 since the assessment and/or collection of such deficiencies, if any, is barred by the period of limitations provided in Section 275(a) of the Internal Revenue Code; that the 50% fraud penalties asserted and claimed by respondent in his amended answer are not due from petitioner.

Wherefore, it is prayed that the affirmative relief requested by respondent in his amended answer be denied.

/s/ JOHN I. BOLEN,
Counsel for Petitioner.

[Endorsed]: T.C.U.S. Filed February 26, 1952.

[Title of Tax Court and Cause.]

AMENDMENT TO AMENDED ANSWER

The amended answer to the petition heretofore filed in the above-entitled proceeding is hereby amended by inserting immediately after paragraph 13, and before the prayer, the following allegations:

14. In event the Court should hold that the deficiencies for the taxable years are not due to fraud with the intent to evade tax, the respondent alleges that the deficiencies for the taxable years were and are due to negligence within the meaning of section 293(a) of the Internal Revenue Code and that there are, accordingly, due from the petitioner a 5% negligence penalty for the taxable year 1944 in the amount of $112.94, and a 5% negligence penalty for the taxable year 1945 in the amount of $553.74, for which claim is hereby asserted and made.

/s/ MASON B. LEMING,
Acting Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. Neblett, District Counsel.

R. E. Maiden, Jr., Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed April 4, 1952.

[Title of Tax Court and Cause.]

REPLY TO AMENDMENT TO AMENDED ANSWER

The above named petitioner, in reply to the allegations set forth by the Respondent in his Amendment to Amended Answer, admits, denies and alleges as follows:

14. Denies the allegations contained in paragraph 14, which paragraph is added to the Amended Answer by the Amendment to Amended Answer.

Wherefore, it is prayed that the affirmative relief requested by Respondent in his Amendment to Amended Answer be denied.

/s/ WILLIAM A. CRUIKSHANK, JR.,
Counsel for Petitioner.

Of Counsel:

John I. Bolen, Louis T. Fletcher, Esq., Owen E. O'Neil, Esq.

[Endorsed]: T.C.U.S. Filed April 18, 1952.

[Title of Tax Court and Causes.]

FINDINGS OF FACT AND OPINION

L. Glenn Switzer, et al.,[1] Petitioners, vs. Commissioner of Internal Revenue, Respondent. Docket Nos. 28256, 28257, 28258, 28259. Promulgated June 30, 1953.

Petitioners, L. Glenn Switzer and Howard A. Switzer, were partners in the Transit Mixed Concrete Company during 1944 and 1945. Petitioner, Ida H. Switzer, is the wife of L. Glenn Switzer; and petitioner, Florence M. Switzer, is the wife of Howard A. Switzer. One-half of each husband's partnership interest constituted community property of said spouses under California law. A partnership return of income for each of the years 1944 and 1945 was filed on or before March 15, 1945, and March 15, 1946, respectively. Individual income tax returns were filed by each of the four petitioners for each of the years 1944 and 1945 on or before the 15th day of March following such year. The respondent determined deficiencies and a five per cent negligence penalty under section 293(a) against all four petitioners, and asserted fraud penalties for both years against the two husbands.

1. Held, no part of any of the deficiencies for either of the taxable years determined with respect

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[1] Proceedings of the following petitioners are consolidated herewith: Petitioners: Ida H. Switzer, Docket No. 28257; Howard A. Switzer, Docket No. 28258; Florence M. Switzer, Docket No. 28259.

to the two husbands was due to fraud with intent to evade tax.

2. Held, further, no part of any of the deficiencies for either of the taxable years determined against the wives was due to negligence.

3. Held, further, part of the deficiencies for each of the taxable years determined against the husbands was due to negligence.

4. Held, further, each of the petitioners for each of the taxable years omitted gross income in excess of 25 per cent of the gross income stated in his or her respective return, and the deficiencies was timely asserted within the five-year period provided by section 275(c) of the Code.

William A. Cruikshank, Jr., Esq., for the petitioners.

R. E. Maiden, Jr., Esq., for the respondent.

These consolidated proceedings involve Federal income tax deficiencies and penalties for the calendar years 1944 and 1945 as follows:

Petitioner	Year	Deficiency*	50% Penalty	5% Penalty**
L. Glenn Switzer	1944	$ 2.258.86	$1.029.53	$112.94
	1945	11.074.91	5,537.46	553.74
Ida H. Switzer	1944	2.258.86		112.94
	1945	11.074.91		553.74
Howard A. Switzer	1944	809.91	404.96	40.49
	1945	3.768.68	1.884.34	188.43
Florence M. Switzer	1944	779.91		38.99
	1945	3.653.68		186.69

* Includes claimed increased deficiencies.

** Negligence penalty asserted in Docket Nos. 28256 and 28258, in event Court should hold fraud not established.

The questions to be decided are: (1) whether a

part of each deficiency for each taxable year in Docket Nos. 28256 and 28258 is due to fraud with intent to evade tax; (2) if no part of the deficiencies is due to fraud with intent to evade tax, is a part of each deficiency for each taxable year in said Dockets due to negligence within the meaning of section 293(a); (3) whether a part of each deficiency for each taxable year in Docket Nos. 28257 and 28259 is due to negligence within the meaning of section 293(a); and (4) whether the five-year period of limitations is available to the respondent under section 275(c) by reason of the omission of gross income in excess of 25 per cent of the gross income stated in each return.

The five per cent addition to the tax under section 293(a) was plead affirmatively by the respondent in amendments to his answers. In Docket Nos. 28256 and 28258, it was an alternative plea to the allegation of fraud. The statutory period for assessment was not extended by any waivers.

Some of the facts were stipulated.

Findings of Fact

The stipulated facts are so found and are incorporated herein.

The petitioners, L. Glenn Switzer and Howard A. Switzer, were partners during the years 1944 and 1945, carrying on their partnership business under the firm name of Transit Mixed Concrete Company, in Pasadena, California. The interests of said L. Glenn Switzer and Howard A. Switzer

in that partnership were two-thirds and one-third, respectively.

During said years L. Glenn Switzer was married to Ida H. Switzer; said two-thirds partnership interest constituted the community property of said spouses under the laws of the State of California. During said years Howard A. Switzer was married to Florence M. Switzer; said one-third partnership interest constituted the community property of said spouses under the laws of the State of California.

All of the income of the petitioners during the years 1944 and 1945 was derived from said partnership, Transit Mixed Concrete Company.

A partnership return of income for each of the years 1944 and 1945 was filed on or before March 15, 1945, and March 15, 1946, respectively. Individual income tax returns were filed by each of the four petitioners for each of the years 1944 and 1945 on or before the 15th day of March following such year. The notice of deficiency in each proceeding, covering both taxable years, was mailed on February 24, 1950. The respective deficiencies were, therefore, determined and asserted beyond three but within five years after the respective returns were filed.

The income of said partnership, as reported on the partnership returns and as corrected, is as follows:

Year	Reported Gross	Corrected Gross	Reported Net	Corrected Net
1944	$384,905.04	$405,394.12	$13.936.73	$34,425.81
1945	526,068.71	594.262.31	15,332.71	83,526.31

The gross receipts of the partnership, as reported

and as corrected, together with the amount omitted expressed as a percentage, are as follows:

Year	Reported	Corrected	Percentage Omitted
1944	$1,271,448.34	$1,291,937.40	1.5%
1945	1,729,486.97	1,797,680.57	3.9%

Each petitioner's share of net partnership income, as reported and as corrected, is as follows:

	1944		1945	
	Reported	Corrected	Reported	Corrected
L. Glenn Switzer	$4,645.58	$11,475.26	$5,110.91	$27,842.11
Ida H. Switzer	4,645.58	11,475.27	5,110.91	27,842.11
Howard A. Switzer	2,322.79	5,737.63	2,555.45	13,921.05
Florence M. Switzer	2,322.78	5,737.63	2,555.45	13,921.05

The following deficiencies are due in the event that the Court holds that the assessment of such deficiencies, or any of them, is not barred by the statute of limitations:

	1944	1945
L. Glenn Switzer	$2,258.86	$11,074.91
Ida H. Switzer	2,258.86	11,074.91
Howard A. Switzer	809.91	3,768.68
Florence M. Switzer	779.91	3,653.68

The statutory notices issued to petitioners, Howard A. Switzer, Docket No. 28258, and L. Glenn Switzer, Docket No. 28256, contained the following determination of the additional income giving rise to the deficiencies:

The following adjustments to the ordinary net income of the Transit Mixed Concrete Company, a partnership, for its taxable years ended December 31, 1944 and December 31, 1945, are based upon an audit made of the books of the partnership * * * as shown below:

	1944	1945
Ordinary net income as disclosed by partnership return	$13,936.73	$ 15,332.71
Additional income:		
California-Portland Cement Co.— special discounts	6,082.29	19,265.66
Discounts not taken by customers	4,152.63	17,249.20
Sales tax omitted on invoices	20,864.23	36,776.34
Unidentified items	1,872.98	1,872.96
Corona Nov. Dec. sales omitted	.....	17,298.31
Total	$46,908.86	$107,795.18
Nontaxable income:		
Hollywood cash sales entered twice	14,661.50	26,442.09
Ordinary net income adjusted	$32,247.36	$ 81,353.09

Each of the petitioners and the individual who prepared the returns of the partnership and of the petitioners for each of the taxable years were either present in the courtroom at the time of the hearing of these proceedings, or else were available on call, in response to subpoenas issued at the request of the respondent. Neither the respondent nor the petitioners called any of said parties as a witness. All of the books and records of the partnership were in the courtroom and available as evidence, but were not offered in evidence by any of the parties.

The respondent offered a short stipulation of facts and the deficiency notices in evidence, together with the partnership returns and the petitioners' individual returns for the taxable years, and rested. The petitioners also rested without offering any further evidence.

No part of any of the deficiencies for either of the taxable years determined against the husbands was due to fraud with intent to evade tax.

No part of any of the deficiencies for either of the taxable years determined against the wives was due to negligence within the purview of section 293(a) of the Internal Revenue Code.

Part of the deficiencies for each of the taxable years determined against the husbands was due to negligence within the purview of section 293(a) of the Internal Revenue Code.

Each of the petitioners for each of the taxable years omitted gross income in excess of 25 per cent of the amount of gross income stated in his or her respective income tax return, and the deficiencies were timely asserted within the five-year period provided by section 275(c) of the Internal Revenue Code.

Opinion

Rice, Judge: In amended answers the respondent asserted fraud penalties against L. Glenn Switzer and Howard A. Switzer, but not against their wives. The wives were not partners in the business but merely had a community interest in the income therefrom.

The respondent argues that for the taxable years 1944 and 1945 the net distributable income of the business was $34,425.81 and $83,526.31, respectively; and that since petitioners and their wives, in the aggregate, reported only $13,936.73 on their 1944 returns and $15,322.72 on their 1945 returns, they understated the income from their business by $20,489.08 for 1944 and $68,203.59 for 1945; and that, expressed in percentages, each of the petitioners failed to account for his or her true in-

come in 1944 by 147.01 per cent and in 1945 by 444.01 per cent. He states that, even in the face of a charge of fraud, the two brothers chose to remain silent and to let go wholly unexplained the reasons for such gross discrepancies between their real and their reported income for two straight years.

He points out that the additions determined in the deficiency notices represent an understatement of discounts received in the amounts of $6,082.29 in 1944 and $19,265.66 in 1945; an overstatement of discounts taken by customers in the amounts of $4,152.63 in 1944 and $17,249.20 in 1945; the omission of sales in 1945 to the extent of $17,298.31; sales' taxes that had not been included in invoices and, consequently, not in sales, resulting in an understatement in 1944 of $20,864.23 and in 1945 of $36,776.34; and other minor omissions of unidentified items in both years.

He contends that the courts have consistently held that the unsatisfactory accounting, or no accounting, for omissions of income in consecutive years in excess of 100 per cent of true income is sufficient proof of fraudulent intent to sustain the 50 per cent penalty of section 293(b),[1] citing Rogers

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[1] Sec. 293. Additions to the Tax in Case of Deficiency. * * * * *

(b) Fraud.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

vs. Commissioner, 111 F. 2d 987 (C. A. 6, 1940); Arlette Coat Company, 14 T. C. 751 (1950); and a Memorandum Opinion of this Court. He concludes by arguing that it is unreasonable that the two brothers should have honestly believed that their business had profited in two tax years only to the extent of $39,259.44 when the actual profits of the business were $117,952.12, and that the only conclusion to be drawn, in the absence of any explanation from petitioners, is that petitioners were aware that they were not reporting their true income and intended to evade their correct tax liabilities.

The cases cited by respondent for the proposition that "omissions of income in consecutive years in excess of 100% of true income is sufficient proof of fraudulent intent to sustain the 50% penalty" do not so hold. The holdings in those cases are based on the entire record and not on the omission of income alone. In addition, such cases are distinguishable on their facts. It appears from the deficiency notices in this case that there were errors which resulted from large overstatements of income as well as large understatements.

The burden of proof in fraud cases is, of course, upon the respondent. It must be clear and convincing proof. Evidence of inefficiency and ignorance of accounting methods are not sufficient to establish fraud. Walter M. Ferguson, Jr., 14 T. C. 846 (1950); W. F. Shawver Co., 20 B. T. A. 723 (1930). Here, we are not even advised that there was inefficiency or ignorance. We are shown merely that

there was a large understatement of income, and, on that showing the respondent rests his case. That is not enough to carry his burden of proof to establish fraud. The Commissioner cannot sustain his burden of proof on a fraud issue by statements made in his notice of deficiency. Oscar G. Joseph, 32 B. T. A. 1192, 1204 (1935). That fraud is not established by the mere understatement of taxable income is shown by our holding in James Nicholson, 32 B. T. A. 977, 989 (1935), affd. 90 F. 2d 978 (C. A. 8, 1937), where we said:

* * * Here fraud is not admitted. The mere fact that his return showed a net income for the taxable year 1929 in the sum of $40,424.66 and the respondent, in recomputing his tax liability, determined that the net income for that year was $73,435.38, by itself, does not establish fraud. If it did, then all taxpayers against whom deficiencies are determined would be guilty of fraud and subject to the imposition of a fraud penalty.

Fraud implies bad faith, intentional wrong-doing, and a sinister motive. It is never imputed or presumed. Mere suspicion of fraud and mere doubts as to the intentions of the taxpayer are not sufficient proof of fraud. Sharpsville Boiler Works Co., 3 B. T. A. 568 (1925); J. William Schultze, 18 B. T. A. 444 (1929); Arthur M. Godwin, 34 B. T. A. 485 (1936); Arthur S. Barnes, 36 B. T. A. 764 (1937); Nicholas Roerich, 38 B. T. A. 567 (1938). affd. 115 F. 2d 39 (C. A. D. C., 1940), certiorari denied 312 U. S. 700 (1941); L. Schepp Co., 25 B. T. A. 419 (1932).

Respondent's amendments to his answers in this case allege no facts in support of the fraud charge except that petitioners received net taxable income in excess of the amount set forth, and respondent's conclusion that the petitioners knowingly and fraudulently failed to report such amounts.

Reading between the lines of the record made in this case could lead one to a number of conclusions as to why the understatement of income occurred. We are not, however, permitted to speculate. The burden is that of the respondent, and he has failed to sustain it. The reports are replete with cases where the Commissioner has offered a considerable amount of evidence other than the deficiency notice and the returns to sustain his burden of proving fraud but has fallen short thereof. The witnesses subpoenaed by the respondent were in the courtroom at the hearing of these proceedings or were available on short notice. They included the petitioners and the bookkeeper who prepared the returns, but they were not called as witnesses. The books and records of the partnership were also in the courtroom, but they were not offered in evidence either. To hold that there was fraud with intent to evade taxes under these facts would be tantamount to a holding that fraud may be presumed. See Henry S. Kerbaugh, 29 B. T. A. 1014 (1934), affd. 74 F. 2d 749 (C. A. 1, 1935). We, therefore, hold for petitioners on this issue.

The respondent, by amendments to the answers, affirmatively alleged that a part of each deficiency for each taxable year in the case of each petitioner

was due to negligence, and that, therefore, the five per cent addition to the tax provided by section 293(a)[2] is applicable.

As to the two wives, it is stipulated that their interest in the partnership income arises from the community property law of the State of California. Under that law, the management and control of the community property is vested in the husband.[3] The record does not show that the wives participated in any way in the business of the partnership, in the management of its affairs, in the accounting of the income produced therefrom, or in the preparation of the returns. We, therefore, conclude that as to the wives, the respondent has not sustained his burden of proof; and the five per cent addition to the tax may not be asserted against them. See Harold B. Franklin, 34 B. T. A. 927, 941-942 (1936).

With respect to the two husbands, the record shows that they understated their income in 1944

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[2] Sec. 293. Additions to the Tax in Case of Deficiency. * * * * *

(a) Negligence.—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272(i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable.

[3] Sec. 172, Civil Code of California.

by 147.01 per cent and in 1945 by 444.01 per cent. The deficiency notices show numerous adjustments in large amounts to the net income of the partnership. Such large discrepancies between real net income and reported income and numerous adjustments are strong evidence of negligence and, in our opinion, are sufficient to establish a prima facie case shifting the burden of going forward with the evidence to these petitioners. See Morrisdale Coal Mining Co., 13 T. C. 448 (1949); Estate of L. E. McKnight, 8 T. C. 871 (1947); Robinette vs. Commissioner of Internal Revenue, 139 F. 2d 285 (C. A. 6, 1943), certiorari denied 322 U. S. 745 (1944); B. F. Edwards, 39 B. T. A. 735 (1939); Commissioner of Internal Revenue vs. Renyx, 66 F. 2d 260 (C. A. 2, 1933); C. A. Hutton, 21 B. T. A. 101 (1930), affd. 59 F. 2d 66 (C. A. 9, 1932). No explanation for such large discrepancies between actual and reported income were offered to the Court, and the only fair inference on this record is that the adjustments were necessary primarily because these petitioners were negligent in keeping their accounts and rendering their returns, and that the deficiencies, in part, resulted from their negligence. It, therefore, follows that the five per cent addition to the tax against these petitioners must be upheld. See Watson-Moore, 30 B. T. A. 1197 (1934).

Section 275(c) of the Internal Revenue Code provides that if the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross

income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within five years after the return was filed. The deficiencies in this case were determined and asserted beyond three but within five years after the respective returns were filed.

The petitioners argue that a partner's gross income is his proportionate share of partnership gross income; or, stated another way, that for the purposes of section 275(c) the gross income of a partner is his share of partnership gross income, and not his share of partnership net income. They contend that, under this concept, L. Glenn Switzer and his wife, for example, should be considered the owners and operators of 75 per cent of the partnership business as if it were a separate business operated by them as a sole proprietorship. They state that, if that is correct, their gross income would be total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. On this basis, they argue that the omissions in each of these proceedings and for each of the years do not exceed 25 per cent of the gross income reported.

They also argue that this partnership gross income is "stated in the return"; that it is presented in the manner and on the forms prescribed by the Code and the Commissioner's regulations; that the partnership returns, as informational returns for administrative convenience, disclose data incorporated into the individual returns by reference; that

these data are stated in the individual returns as surely as information contained on Schedule "C" of Form 1040 which is set forth on a separate unattached schedule, furnished by the Commissioner and adopted by him, since 1951, for the sake of convenience, citing Maurice H. Van Bergh, 18 T. C. 518 (1925), on appeal C. A. 2, February 6, 1953; and that, since the basis of taxing the income of partnership operations requires that the partner be treated as if he were a sole proprietor to the extent of his share of the business, except in a few situations covered expressly by statute, there seems to be no justification for applying section 275(c) differently to a partner than to a sole proprietor.

Section 182 of the Code charges to each partner his distributive share of the net income or capital gain of the partnership. That income is required to be reported by each partner on his individual return and is necessarily a part of all of his income which must be included under the broad, general definition of gross income contained in section 22 of the Code. If the petitioners' argument is correct, an anomalous situation would present itself in a case where a partnership has gross income but sustains a net loss for the year. If a partner in such partnership had gross income from other sources which he reported but failed to include therein his proportionate share of the partnership gross income, and such omission resulted in an omission in excess of 25 per cent of the amount of gross income stated in his return, petitioners' argument

would require a holding that section 275(c) applied. Merely to state such a proposition shows the fallacy of petitioners' argument.

In Anna Eliza Masterson, 1 T. C. 315 (1942), reversed on other grounds 141 F. 2d 391 (C. A. 5, 1944), we had occasion to construe section 275(c) in connection with an omission in excess of 25 per cent of gross income shown on a taxpayer's individual return and an estate return in which the taxpayer showed the balance of her income, which should have been reported in her individual return. We there said at page 324:

That section is explicit in its reference to "the taxpayer." The "gross income" from which an omission brings the section into play must be the gross income of that taxpayer and "the return" referred to must be his return. If the provision were to be construed so that an omission from one taxpayer's return would be without effect upon a showing that the unreported income was contained in the return of some other taxpayer, its effect would be largely nullified. In other words, it does not comport with the purpose or language of the statute to say that the gross income shown on the return of another taxpayer is the same as "the gross income" of "the taxpayer."

The petitioners also cite Treasury Regulations 111, section 29.422-2, interpreting section 422(a) of the Code relating to "Unrelated Business Net Income" of exempt organizations; and a 1949 Bureau ruling under section 251 of the Code relating to "Income from Sources Within Possessions of the

United States", C. B. 1949-2, I. T. 3981. We have carefully considered both authorities, which deal with special provisions of the Code, and are of the opinion that they do not help in solving the problem presented here.

We, therefore, hold that the net income of the partnership distributable to petitioners is a part of their gross income for purposes of section 275(c), and the deficiencies were timely asserted.

Decision will be entered under Rule 50.

The Tax Court of the United States
Washington

Docket No. 28256

L. GLENN SWITZER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of this Court as set forth in its Findings of Fact and Opinion promulgated June 30, 1953, the respondent filed his computation for entry of decision on September 30, 1953. Petitioner having noted his acquiescence therein, it is

Ordered and Decided: That there are deficiencies

in income tax and penalties as set forth below:

Year	Deficiency	50% Penalty	5% Negligence Penalty
1944	$ 2,258.86	None	$112.94
1945	$11,074.91	None	$553.75

[Seal] /s/ STEPHEN E. RICE,
Judge

Entered: October 5, 1953.

Served: October 5, 1953.

The Tax Court of the United States
Washington

Docket No. 28257

IDA H. SWITZER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of this Court as set forth in its Findings of Fact and Opinion promulgated June 30, 1953, the respondent filed his computation for entry of decision on September 30, 1953. Petitioner having noted her acquiescence therein, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1944 and 1945

in the respective amounts of $2,258.86 and $11,074.91, and no penalties.

[Seal] /s/ STEPHEN E. RICE,
Judge

Entered: October 5, 1953.
Served: October 5, 1953.

The Tax Court of the United States
Washington

Docket No. 28258

HOWARD A. SWITZER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of this Court as set forth in its Findings of Fact and Opinion promulgated June 30, 1953, the respondent filed his computation for entry of decision on September 30, 1953. Petitioner having noted his acquiescence therein, it is

Ordered and Decided: That there are deficiencies in income tax and penalties as set forth below:

Year	Deficiency	50% Penalty	5% Negligence Penalty
1944	$ 809.91	None	$ 40.49
1945	$3,768.68	None	$188.43

[Seal] /s/ STEPHEN E. RICE,
Judge

Entered: October 5, 1953.
Served: October 5, 1953.

The Tax Court of the United States
Washington

Docket No. 28259

FLORENCE M. SWITZER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of this Court as set forth in its Findings of Fact and Opinion promulgated June 30, 1953, the respondent filed his computation for entry of decision on September 30, 1953. Petitioner having noted her acquiescence therein, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1944 and 1945 in the respective amounts of $779.91 and $3,653.68, and no penalties.

[Seal] /s/ STEPHEN E. RICE,
Judge

Entered: October 5, 1953.

Served: October 5, 1953.

[Title of Tax Court and Causes 28256-7-8-9.]

STIPULATION OF FACTS

The petitioners hereto, by their respective counsel, hereby stipulate and agree that the following facts may be found as true:

1. The petitioners, L. Glenn Switzer and Howard A. Switzer, were partners during the years 1944 and 1945, carrying on their partnership business under the firm name of Transit Mixed Concrete Company, in the City of Pasadena, County of Los Angeles, State of California. The interests of said L. Glenn Switzer and Howard A. Switzer in that partnership were two-thirds and one-third, respectively.

2. During said years L. Glenn Switzer was married to Ida H. Switzer; said two-thirds partnership interest constituted the community property of said spouses under the laws of the State of California. During said years Howard A. Switzer was married to Florence M. Switzer; said one-third partnership interest constituted the community property of said spouses under the laws of the State of California.

3. All of the income of the petitioners during the years 1944 and 1945 was derived from said partnership, Transit Mixed Concrete Company.

4. A Partnership Return of Income (Form 1065) for each of the years 1944 and 1945 was filed on or before March 15, 1945 and March 15, 1946, respectively. Individual Income Tax Returns (Form 1040) were filed by each of the four petitioners for each of the years 1944 and 1945 on or before the 15th day of March following such year.

5. The income of said partnership, as reported on the partnership returns and as corrected, is as followes:

Year	Reported Gross	Corrected Gross	Reported Net	Corrected Net
1944	$384,905.04	$405,394.12	$13,936.73	$34,425.81
1945	526,068.71	594,262.31	15,332.71	83,526.31

The reported business receipts of said partnership for the years 1944 and 1945 were $1,271,448.34 and $1,729,486.97, respectively.

6. Each petitioner's share of net partnership income, as reported and as corrected, is as follows:

	1944		1945	
	Reported	Corrected	Reported	Corrected
L. Glenn Switzer	$4,645.58	$11,475.26	$5,110.91	$27.842.11
Ida H. Switzer	4,645.58	11,475.27	5,110.91	27,842.11
Howard A. Switzer	2,322.79	5,737.63	2,555.45	13,921.05
Florence M. Switzer	2,322.78	5,737.63	2,555.45	13,921.05

7. The following deficiencies are due in the event that the Court holds that the assessment of such deficiencies, or any of them, is not barred by the statute of limitations:

	1944	1945
L. Glenn Switzer	$2,258.86	$11,074.91
Ida H. Switzer	2,258.86	11,074.91
Howard A. Switzer	809.91	3,768.68
Florence M. Switzer	779.91	3,653.68

Dated: April 16, 1952.

/s/ WILLIAM A. CRUIKSHANK, JR.,
Counsel for Petitioner

/s/ MASON B. LEMING,
Acting Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent

[Endorsed]: T.C.U.S. Filed April 17, 1952.

[Title of Tax Court and Causes 28256-7-8-9.]

TRANSCRIPT OF PROCEEDINGS

Court Room No. 1602, United States Post Office and Court House Building, Los Angeles, Calif., April 17, 1952, 10:15 a.m.

(Met pursuant to notice.)

Before: Honorable Stephen E. Rice, Judge.

Appearances: Alva C. Baird and William A. Cruikshank, Jr., 458 So. Spring St., Los Angeles, Calif., appearing for the Petitioners. R. E. Maiden, Jr., (Honorable Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent.

The Court: Call the Switzer case.

The Clerk: 28256, L. Glenn Switzer; 28257, Ida H. Switzer; 28258, Howard A. Switzer, and 28259, Florence M. Switzer.

Mr. Cruikshank: William A. Cruikshank, Jr., for the Petitioners.

Mr. Maiden: R. E. Maiden, Jr., for the Respondent.

The Clerk: Pardon me, but are you enrolled to practice?

Mr. Cruikshank: We filed our entry last month, Mr. Baird and I. There are also others that have previously done so.

I would like to make a motion at this time that these four cases be consolidated for hearing, trial and briefs.

Mr. Maiden: No objection.

The Court: The motion is granted.

Mr. Cruikshank: I believe we have one other matter that I mentioned at the calling of the calendar last Monday, and that is our objection to a motion that was filed by the Respondent in each of these cases for leave to file an amendment to his amended Answer.

The Court: That motion was granted in Washington. Didn't you get a copy?

Mr. Cruikshank: We received a copy of it just this week. We would like to ask the Court to vacate that order and reconsider, in view of the history of the pleadings developed in this case and the Respondent's method of preparing the case. There has been nothing new arising in the case for—the statutory notice was issued more than two years ago. The statutory notice was based entirely upon the Revenue Agent's report, which was two years and ten months ago. There has been no new development in the case, and yet the Respondent has amended his Answer in January of this year, which necessitated the postponement of a previous trial setting, and in that amendment he raised fraud.

Now, less than a week before this hearing he amended his Answer again, or makes an amendment to his Amended Answer to raise negligence. We believe that it is unfair to the Petitioners, and that the rather piecemeal prolonged approach that the Respondent is taking in these cases should not be approved by the Court.

Mr. Maiden: If the Court please, I think quite obviously counsel's motion should be denied. The

nature of this amendment asserting the negligence penalty is the type of amendment that is commonly made and is properly made, even after the conclusion of the hearing in a case where the Petitioner even had no notice of it, and I think, as I say, the motion was sent in on April 1st, and I am pretty sure that I advised counsel some week or ten days ago of the motion, and it is something, it is the type of an amendment that follows the proof in the case, and, as I say, is one that is proper to be made and considered and allowed after the evidence has been adduced, in order to conform with the proof.

The Court: The motion is denied.

Mr. Cruikshank: I believe in these cases we have a stipulation which I would ask the Government counsel to file at this time.

Mr. Maiden: At this time, if the Court please, I file a stipulation of facts in the case. I should like to state to the Court the nature of the issues involved and the substance of the stipulation of facts.

The Court: Are you making an opening statement now?

Mr. Maiden: Do you want to make your statement?

Opening Statement on Behalf of the Petitioners

By Mr. Cruikshank:

Mr. Cruikshank: In this case, your Honor, in view of the stipulation, the Respondent has the burden of proof in all respects. We stipulate cer-

tain deficiencies are due if the assessment is not barred by the statute of limitations. Respondent urges the fraud penalty and has affirmatively pleaded in the Amended Answer the negligence penalty.

Opening Statement on Behalf of the Respondent By Mr. Maiden:

Mr. Maiden: If the Court please, as Mr. Cruikshank said, the only two issues in this case are whether or not the assessment of the deficiencies, as determined in the Answer of the Respondent, in which increased deficiencies were asserted, were assessed within the statutory period. That turns upon Section 275 (c) of the Internal Revenue Code, which provides a five-year period of limitations, in the event the taxpayer omitted from income amounts, gross income amounts, proper includable income, gross income, in excess of the 25 per cent of the amount of gross income reported on the return, and the Respondent's position is that the stipulation of facts in this case show that each of the Petitioners failed to report more than 25 per cent of amounts includable in gross income in excess of the amounts of gross income reported in the income, so that the period of limitation is five years rather than the three-year period, and the statutory notices were issued within the five-year period. That presents really a question of law only. The facts are not in dispute.

The other issue is a factual issue entirely, and that is the question of whether or not any part of

the deficiencies which are agreed to in this case, provided they are not barred by the statute of limitations, were due to fraud with the intent to evade taxes. The statutory notices, if the Court please, set forth in particularity the amounts and types of unreported income which gives rise to the deficiencies. The pleadings do not contest any of those items, but simply places in issue the bar of the statute.

The stipulation of facts in the case sets forth the amount of gross income that was reported on the partnership return. I might state to the Court in this connection that Mr. L. Glenn Switzer and Mr. Howard Switzer operated a partnership, and Mr. Glenn Switzer having a two-thirds interest, and Mr. Howard Switzer, a one-third interest. And, as I stated, the stipulation shows the amount of gross income for each of the years reported on the partnership return of income, the correct amount of gross income for those years, and the reported and correct amount of income, and that same information is given as to the individuals.

The stipulation shows, if the Court please, that for the year 1944 the partnership return reported net income, net distributable income, to the partnership, of $13,936.73. And it is stipulated that the correct net income of the partnership for that year was $34,425.81.

For 1945 it is stipulated that the partnership return showed a net distributable income of $15,-332.71, and that the correct net income of the partnership for that year was $83,426.31.

And in the case of the individuals, L. Glenn Switzer, for 1944, it shows that the Petitioner's share of the net partnership income was $4,645.58. That is on the community property basis. You would have to consider his wife, Ida H. Switzer, who also reported on her return, $4,645.58. The total of those two would be about five thousand two hundred eighty some odd dollars reported. The correct amount of their net distributable income from the partnership was about twenty-two thousand plus.

For 1945 Mr. Glenn Switzer and his wife reported approximately $10,200.00, whereas it is stipulated that the correct net income was about $51,000.00.

In 1944 Howard A. Switzer and his wife reported approximately $4,600.00, and it is stipulated that their correct net distributable income from the partnership was about $11,000.00.

In 1945 Howard and his wife reported about five thousand plus, and it is stipulated that their correct net income was about $27,000.00.

Now then, if the Court please, based upon—at this time I want to offer in evidence as Respondent's exhibits the returns involved in this case. I should like to offer first, as Respondent's Exhibit A, the partnership return of the Transit Mixed Concrete Company for the taxable year 1944.

The Clerk: Exhibit A.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit No. A.)

[See pages 69-72.]

Mr. Maiden: And as Respondent's Exhibit B, the partnership return for the taxable year 1945 for the Transit Mixed Concrete Company.

The Clerk: Exhibit B.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit B.)

[See pages 73-77.]

Mr. Maiden: And I would like to offer in evidence as Respondent's Exhibit C the 1944 individual income tax return of Ida H. Switzer.

The Clerk: Exhibit C.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit C.)

Mr. Maiden: And as Respondent's Exhibit D, I offer the individual income tax return for 1945 of Ida H. Switzer.

The Clerk: Exhibit D.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit D.)

Mr. Maiden: I offer the individual income tax return of Florence Switzer for 1944 as Exhibit E.

The Clerk: Exhibit E.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit E.)

Mr. Maiden: And as Respondent's Exhibit F, the individual tax return for 1945 of Florence Switzer.

The Clerk: Exhibit F.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit F.)

Mr. Maiden: As Respondent's Exhibit G, I offer in evidence the 1944 individual income tax return of Howard A. Switzer.

The Clerk: Exhibit G.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit G.)

Mr. Maiden: As Respondent's Exhibit H, I offer in evidence the 1945 individual income tax return of Howard A. Switzer.

The Clerk: Exhibit H.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit H.)

Mr. Maiden: As Respondent's Exhibit I, I offer in evidence the individual income tax return for 1945 of L. Glenn Switzer.

The Clerk: Exhibit I.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit I.)

[See page 78.]

Mr. Maiden: As Respondent's Exhibit J, I offer in evidence the 1945 individual income return of L. Glenn Switzer.

The Clerk: Exhibit J.

The Court: It may be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit J.)

[See page 79.]

Mr. Maiden: Now, if the Court please, I should like to have marked in evidence, simply for the purpose of showing as proof of the characterization and amounts of unreported income, simply for that purpose, the statutory notice in each of the cases.

Mr. Cruikshank: I would object to that, your Honor. The Revenue Agent or whoever prepared those statutory notices is not here. I would ask that he be called to the stand to testify.

The Court: Are these statutory notices of deficiency?

Mr. Maiden: They are attached to the Petitions. They are not in evidence, of course, but it is the practice of the Court and I don't know of anybody ever questioning that those statutory notices may be referred to and are referred to by the Court for the purpose of showing that adjustments

were made by the Commissioner in arriving at the deficiencies.

Mr. Cruikshank: For that purpose solely, I have no objection.

Mr. Maiden: That is the only purpose I had—for example, if the Court please, I am referring to the statutory notice in the case of Ida H. Switzer, the one I happen to have before me, and on page 2 of the statement attached to the notice of deficiency, the statement occurs:

"The following adjustments to the ordinary income of the Transit Mixed Concrete Company, a partnership, for the taxable years ended December 31, 1944, and 1945, are based upon an audit made of the books of the partnership and results in an increase of your share thereof as shown below."

And then below is listed the ordinary net income, as disclosed by the partnership return for each of the years, and as additional income the following specifications appear:

"Portland Cement Company, special discounts." As I say, that is addition to income, and in 1944 it is $6,082.29, and in '45 it is $19,265.66. The Court will find that that was unreported earned discounts.

The next item is "Discounts not taken by customers." This is also in addition to income. In 1944 it was $4,152.63, and in 1945 it was $17,249.20.

The next item, which is likewise in addition to income, is "Sales tax *admitted* on invoices." In 1944 the amount is $20,864.23, and in 1945 it is $36,776.34.

Then there is a small unidentified item, and then there is an item, "Corona—November, December Sales Omitted," which applies to the year 1945, in the amount of $17,298.31.

Now, as I say, the pleadings in this case do not take issue with any of those adjustments. And simply for the purpose of showing these additions to income, I would like to have the statutory notices marked in evidence as Respondent's next four exhibits in order.

Mr. Cruikshank: Petitioners have no objection if it is only for the purpose of showing the amounts and general nature of the adjustments. However, we do not at all agree with some of the descriptions contained, describing these adjustments here, and when this motion is concluded I would ask counsel to stipulate on one or two of those.

The Court: Is that agreeable to counsel for the Respondent, that they be admitted for that limited purpose only?

Mr. Maiden: Of course, if the Petitioner has any proof that the Respondent has not properly characterized these items, why, then of course the Petitioner can prove what the correct designations should be. As I say, they are not put in issue of the pleadings as of this moment.

Mr. Cruikshank: If the Court please, we are not at issue on the deficiencies, except where the statute of limitations is concerned. I would object to these descriptive phrases in the statutory notice of deficiency being accepted in evidence as tending to prove fraud, which is the only thing at issue.

The Court: As I understand it, the only reason for Respondent offering these is to show the figures rather than the characterization.

Mr. Maiden: Well, I wanted to show the characterization, too, if the Court please.

Now, the Commissioner, in his statutory notice, has determined that certain additions should be made to income and he has set forth, he has determined the nature and character of that addition to income. Now, that is prima facie correct in the first place. In the second place, the pleadings in the case do not put into issue either the amounts or the characterization and nature of the additions to income, and unless and until Petitioner proves that these characterizations of the additions to income are incorrect, why, I think Respondent prevails on that. That is my position.

Mr. Cruikshank: If the Court please, this statutory notice of deficiency does not raise fraud. The Commissioner's conclusion at that time was that there was no fraud or, at least, not asserted. Now the Petitioner——

Mr. Maiden: That is his thinking up to that time, the basis of investigation up to that time.

Mr. Cruikshank: Well, his published statutory notice of deficiency.

Mr. Maiden: That is correct.

Mr. Cruikshank: We accepted in our Petitions —admitted the deficiencies as based upon the statutory notice of deficiency. But for the statute of limitations, we do not now wish to concede—first of all, the only thing that these statutory notices

are presumptively correct is the amount of deficiency and that is not in dispute.

We therefore ask that the Respondent be required to be put on proof that the types of these——

The Court: The Respondent has the burden of proof of fraud, and just because the statutory notice of deficiency goes into the record, the Respondent can't just stand on that and claim that he has sustained his burden of proving fraud, certainly not.

Mr. Cruikshank: But we would, if these phrases here, "Sales Tax Omitted on Invoices,"—if that is to go into evidence as a factor tending to prove that fact, we would like an opportunity to examine the person who arrived at the determination. Otherwise, we think it would not be taken into evidence.

The Court: Well, I will let it in for the limited purpose of showing the amounts and how the Commissioner arrived at his conclusion, but Petitioner needn't fear that this Court will use that characterization to permit the Respondent to sustain his burden of proof of fraud.

Mr. Maiden: Of course, it is the Respondent's position that the Petitioner stipulated to the full amount of deficiency, not only as set forth in the statutory notice, but also as set forth in the Amended Answer, in which increased deficiencies are asserted; that the Petitioner necessarily agrees and accepts as correct all of the adjustments made in the statutory notice.

The Court: All right, they will be received.

(The documents above referred to were received in evidence and marked Respondent's Exhibits K, L, M and N.)

Mr. Maiden: Now, if the Court please, there has been received in evidence a stipulation of facts. This stipulation of facts shows that for each of the taxable years these Petitioners received substantial amounts of income. As I pointed out, for one year all of them reporting and submitting it on the community basis of some fifteen thousand dollars, yet they admitted that they had net income that year of some seventy thousand dollars worth of income. The amounts which are admitted, that were not reported in each year, are very substantial. The statutory notice and the pleadings show the nature of this unreported income.

Upon the basis of this stipulation of facts, pleadings, the returns, and exhibits, Respondent maintains that at this point he has made a prima-facie case of fraud, and that if the Petitioner has any proof as to the reasons why these substantial amounts of income were not reported consistent with the absence of an intent to evade tax by fraudulent means, then Respondent submits at this time it is Petitioners' burden of proof—not of proof, but burden of going forward at this point with the evidence.

The Court: Have you submitted the statutory notices?

Mr. Maiden: Sir?

The Court: Have you filed the statutory notices?

Mr. Maiden: I didn't submit the statutory no-

tices. The practice that I follow, that is, the general practice is that the Clerk simply marks the statutory notices in the Court's file.

The Court: That would be all right.

Mr. Maiden: With the exhibit number next in order.

The Court: Mr. Cruikshank.

Mr. Cruikshank: First of all, I would like to point out, since Respondent has relied so heavily on the statutory notice of deficiency in the evidence for the limited purpose, as Exhibit K, that there is an additional adjustment of income to the partnership, that is, a reduction in income to correct an error whereby the sales from the Hollywood branch of this concern were reported twice, were duplicated in each of the two years. So that even using the very limited and perhaps inexact characterizations of these adjustments that appear in the statutory notice, it appears that there were errors in the records of this partnership which resulted in both an understatement and in an overstatement of the taxable income.

The Court: Is that a part of the stipulation? Is that in the stipulation?

Mr. Cruikshank: No, that is not.

Mr. Maiden: Those adjustments are shown in the statutory notice, if the Court please.

The Court: All right.

Mr. Cruikshank: Respondent has emphasized, in considering the stipulation, the great amount of difference between the reported net income of the partnership and the correct net income of the part-

nership. He has failed to point out to the Court another fact that also appears in the stipulation and on the face of the return itself, and that is that this partnership had gross receipts in excess of $1,271,000.00 in 1944, and in that year, through errors in their bookkeeping and accounting procedures which work both ways, there was a net understatement which should be added to gross receipts properly, of $20,000.00. That is less than two per cent of the total gross receipts that went through this business, through the books.

In 1945 the gross receipts were almost a million seven hundred and twenty-nine thousand some odd dollars. In that year the net amount by which the partnership income was understated to errors, both ways, was approximately $68,000.00 or approximately four per cent of the total volume of dollars that went through the books. That doesn't appear to us that that constitutes fraud, merely from the understatement of income.

The Respondent has not in any way shown to the Court that there was any intent on the part of the taxpayers, any of the four individual taxpayers, to defraud or evade their income tax. The statute which he relies on for the fraud penalty requires an intent to fraud, with an intent to evade tax, resulting in an understatement of income. Nowhere in the exhibits or other documents on file or in evidence does there appear any intent, any indication of what these understatements could have been to; reliance upon reasonable advice of counsel, a difference of opinion as to whether the items were

taxable, or any of a number of other things which would be required. There is no concealment shown here.

Respondent has not shown that the books were a double set of books or that the adjustments which were made here were concealed.

As a matter of fact, we would show that every item was included in the books, even though characterized in here — for instance, "Corona — November, December Sales Omitted," that that was omitted from the profit and loss statement, but they were all disclosed in the books.

There were errors, perhaps, in failing to make the proper adjustments, close the books at the end of each period, in minor records. But, nevertheless, they were all on the books. More than that, a complete audit was made by the taxpayers, on behalf of the taxpayers, and the results of that audit were made available to the Government before any examination by the Government had been made. And the audit which the statutory notice refers to as the basis of the statutory notice is the audit made by the taxpayers' accountant and not the Revenue Agent.

The revenue agent's report itself upon the statutory notice is based exactly—states that it is in full agreement with the audit presented to the Commissioner voluntarily by the taxpayers.

Mr. Maiden: Of course, I don't agree that where they use the word "audit," that they are talking about the audit of the taxpayers. It simply states that the Commissioner made audit in the case, and

I assume the audit he refers to there is the Commissioner of Internal Revenue.

Mr. Cruikshank: The Respondent assumes that he has carried his burden of proof in the absence of some rebuttal testimony on our part and must then assume that he has overcome the strong burden that has been declared to exist in other such cases. One such case is the matter of Mitchell vs. the Commissioner, "CCA5-1941, 118 F.2d, 308, 310—Negligence, whether slight or great, is not equivalent to the fraud or intent to evade tax named in the statute. The fraud meant is actual, intentional wrong-doing, and the intent required is the specific purpose to evade a tax believed to be owing. Mere negligence does not establish either."

And in Davis against the Commissioner, "CA10th-1950, 184 F.2d, 86, 87—Fraud implies bad faith, intention of wrong-doing and a sinister motive. It is never imputed or presumed and the courts should not sustain findings of fraud upon circumstances which at the most create only suspicion."

We do not believe the Respondent has any evidence in this record which intends to create intentional wrong-doing, specific sinister motives to evade and defraud tax owing by these taxpayers for the years involved.

As to the negligence penalty, there has been no showing on the part of the Respondent tending to show negligence. Negligence must necessarily imply that the taxpayer has a duty to properly report his income, to keep records necessary to allow him to do so. It must find that this taxpayer, or these

taxpayers, all four of them against whom the negligence penalty has been asserted, did not conform to the standard required of them in carrying out that duty, and the failure to measure up to that standard was due to some carelessness on their part. Respondent has not shown in any way that all the facts were not disclosed.

Davis Regulator Company, 36BTA, 437, against the Commissioner, "Honest misunderstanding or difference of opinion as to the character of certain income, omission of income, because of that, does not constitute negligence." Respondent has not shown in any way that the income omitted here did not come within that classification. He has not shown that this business is obviously a large one. It obviously is.

Also, its books, bookkeeping and returns and records are not maintained, obviously, by the two partners, and, even more certainly, by their two wives. He has not shown that there is unreasonableness or negligence on the part of the taxpayers in employing people to maintain their records or in relying upon this.

We feel he has utterly failed to even begin to prove fraud or negligence on the part of any of these taxpayers, and on that basis we would ask move of the Court at this time to dismiss the affirmative allegations in the Commissioner's Amended Answer and in the amendment thereto, in each of these cases relating to fraud and negligence penalties.

The Court: The motion is denied.

Mr. Maiden: If the Court please, the cases have consistently held that the omission of large and substantial amounts of income which the taxpayer admits that he received but did not report, in the absence of any reasons or explanations as to why he had all this income and didn't report it, is sufficient to invoke the provisions of the penalty and that is exactly what the stipulation of facts and the evidence now in the record shows.

Of course, I hardly think there would be any doubt but that a taxpayer receiving $50,000.00 worth of income in a taxable year and reporting only $5,000.00 would be considered guilty of the very grossest type of negligence, if not fraud. I don't think that it is necessary for me to say any more in opposition to counsel's motion.

The Court: Well, I have already denied the motion.

Mr. Maiden: I beg your pardon. I didn't hear it.

I should like the record to show whether Petitioner L. Glenn Switzer is in the courtroom.

Mr. Cruikshank: He is.

Mr. Maiden: Is Petitioner Howard A. Switzer in the courtroom?

Mr. Cruikshank: No, he is not. I realized the Commissioner served subpoenas on him, but counsel for Respondent and I have discussed it and I agreed fully to cooperate with him as to any books or individual records he might want in court. Since you did not request him, we did not feel it was necessary for him to be present, so we did not have him come over.

Mr. Maiden: Is Mr. Dansie in the courtroom?

Mr. Cruikshank: Yes, he is. Stand up, please.

Mr. Maiden: The returns in this case show that Mr. Dansie prepared both the partnership and individual returns for the taxable years. Is that correct?

Mr. Cruikshank: That is correct.

Mr. Maiden: I believe that is all.

The Court: All right.

Mr. Cruikshank: If the Court please, could we have a recess in view of the fact that Respondent wishes to rest?

The Court: We will take a short recess.

(Short recess taken.)

The Court: Mr. Cruikshank.

Mr. Cruikshank: If I may make one further statement to the Court. I would like to point out in connection with the negligence penalty asserted against the two wives in this case, Ida H. and Florence M. Switzer, that the documents in evidence now show that they derived this income solely under the laws of the State of California, that is, community, solely in their status as wives, and under the laws of this state the husband is to have the management and control and the right and duty to manage the community property and the community income.

On that basis and without any showing of anything to the contrary of that on the part of the Respondent, we would ask the Court to dismiss the negligence penalty asserted against the wives. In fact, we so move at this time.

Mr. Maiden: I oppose the motion on the ground that it hasn't been shown that the wives, in fact, did not know that they had more income than they were reporting. I think the motion is without merit and should be denied.

The Court: I am sorry, I can't hear you.

Mr. Maiden: I say in the absence of any evidence that the wives did not, as a fact, know that they had more income than they were actually reporting on their returns, I think the Petitioners' motion is without merit and should be denied, even though under the California law the husband is in charge of the community property. Still, if the wife knew that she was understating her income, why, then the matter of the California law, of course, would become irrelevant and immaterial.

The Court: Well, isn't the burden of proving that issue on the Respondent?

Mr. Maiden: On the negligence penalty?

The Court: Yes.

Mr. Maiden: Well, your Honor——

The Court: You pleaded affirmatively.

Mr. Maiden: And I take the position that when I show that one of these Petitioners received a substantial amount of income which they did not report on their return, that, prima facie at least, I have established negligence.

The Court: All right. I will deny your motion at this time, but I can certainly assure the Petitioners that if the record does not show that the Commissioner has sustained his burden of proof, there will surely be no fraud found or negligence

found. I don't know enough about the case at this particular time to know just exactly what the Respondent can prove by way of evidence. I have to study it.

Mr. Cruikshank: I would just like to clarify this last statement that counsel for Respondent made about these people receiving large amounts of income. This was partnership income. There is no evidence in this case that any of it was distributed to the individual's pocket, that he ever knew or she knew how much net income he or she might be taxable on. There is no necessary relationship between that, as to the amount they received, and the amount of income or profit they might be aware of.

I think one further stipulation that counsel has agreed to; that is, for neither of the years 1944 or 1945 was the statutory period for assessment extended by any waiver executed by any of the taxpayers and the Commissioner.

Mr. Maiden: So stipulated, your Honor.

The Court: The stipulation is received.

Mr. Cruikshank: With that, I believe Petitioners conclude their case, too.

I would like to point out to the Court, however, that in response to subpoenas issued by the Commissioner, Mr. L. Glenn Switzer is here in court. Stand up.

Mr. Dansie is here in court, and Mr. Fechtner is here in court, and Lyle Westcott. They are all here in response to the subpoenas, and available, if Respondent has any questions.

The Court: You may be seated.

Mr. Cruikshank: The books are also here. Mr. Howard Switzer is not here. He was subpoenaed, but counsel and I agreed to make it most convenient for all the parties.

Mr. Maiden: Are the books and records here in the courtroom?

Mr. Cruikshank: Yes, they are.

Mr. Maiden: May we stipulate that Mr. Dansie, who prepared the returns in these cases, was employed—an employee of the partnership during these years?

Mr. Cruikshank: During the years '44 and '45?

Mr. Maiden: That is right.

Mr. Cruikshank: I will stipulate that he worked for the partnership part time.

Mr. Maiden: Would you likewise stipulate that this partnership was subsequently incorporated and that Mr. Dansie is an official of the corporation?

Mr. Cruikshank: I don't see that that has any bearing.

Mr. Maiden: Then you don't stipulate, then?

Mr. Cruikshank: No.

Mr. Maiden: Very well, your Honor.

The Court: Does that conclude the case on both sides?

How much time would you like for briefs? I would like to have concurrent briefs. How much time would you like?

Mr. Cruikshank: If your Honor please, we would appreciate it, if it is agreeable to the Court, if we would file consecutive briefs. In other words, in this case, in view of the state of the record, the

Respondent, the Government, Mr. Maiden, representing the Government, does have the burden of proof. Now, I would like to suggest that he be given what time he reasonably needs to file an opening brief and let us reply to it.

The Court: Is that all right?

Mr. Maiden: If your Honor please, that cuts me off from any kind of a reply.

The Court: No, it doesn't. You can file a reply brief to their original brief.

Mr. Cruikshank: Mr. Maiden was talking about the Respondent filing an opening brief and Petitioners replying to Respondent's brief.

The Court: Then you can file a reply brief to that.

Mr. Maiden: I have no objection.

The Court: How much time do you need?

Mr. Maiden: I should like, and I don't want the Court to get mad at me—I have a tremendous load of briefs already. On my brief I should like 60 days.

The Court: You can have 90, if you want it.

Mr. Maiden: I should like that.

The Court: 90 days for Respondent's original brief.

How much time do you want?

Mr. Cruikshank: 30 days would be all right, but it takes two or three weeks——

The Court: 45 days?

Mr. Cruikshank: That would be fine.

The Court: 45 days for Petitioner's brief.

Mr. Maiden: Your Honor, 30 days.

The Court: 30 days for reply brief.

Mr. Maiden: Yes. If the Court please, I forgot to ask permission to withdraw the originals of these returns and substitute photostat copies.

The Court: Permission granted.

Mr. Cruikshank: This seems to be a morning of quick changes. We will be filing replies to the amendment to the Amended Answer. May we file those with the Clerk tomorrow morning?

The Court: Yes. That is all.

(Whereupon, at 11:45 o'clock a.m., Thursday, April 17, 1952, the hearing in the above-entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed May 1, 1952.

UNITED STATES

ORM 1065

PARTNERSHIP RETURN OF INCOME 1944

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1944

or fiscal year beginning Jan. 1, 1944, and ending Jan. 1, 1945

File this return in the Collector of Internal Revenue not later than the 15th day of the 3d month following the close of the taxable year

[PRINT PLAINLY NAME AND ADDRESS OF THE ORGANIZATION]

Transit Mixed Concrete Company
(Name)

3464 E. Foothill Blvd.
(Street and number)

Pasadena, California.

Business or Profession Mixed Concrete, Rock-Sand.

8720445

RECEIVED
MAR 15 1945
INT. REV.
LOS ANGELES, CAL.

GROSS INCOME

		Corona.	67,057.34
		La.	1,204,391.00
			1,271,448.34
(a) Inventories at beginning of year			
(b) Merchandise bought for sale		775,594.95	
(c) Cost of labor, supplies, etc.		252,921.49	
(d) Total of lines (a), (b), and (c)		1,028,516.44	
(e) Less inventories at end of year			
(f) Cost of goods sold (or loss) from business or profession (Schedule A)			842,931.90
Net profit (or loss) from other partnerships, syndicates, pools, etc.			
Interest on bank deposits, notes, corporation bonds, etc. (report interest to be reported in item b)			470.00
Interest on tax-free covenant bonds upon which a Federal tax will be paid by partnership			
Interest on Government obligations, etc.			
(a) From Schedule A, line (f)			
(b) From Schedule A, line (j)			
Rents			404.00
Royalties			
Gain (or loss) from sale or exchange of property other than capital assets (from Schedule D)			
Dividends			
Other income (state nature of income) Equipment Rental, 17,138.49, Mis. Sales-154. Discounts earned, 146,628.56			141,090.05
Total income in items 3 to 12			584,905.04

ACCEPTED

DEDUCTIONS

Salaries and wages (do not include compensation for partners)	86,656.68
Repairs	4,587.20
Interest on indebtedness (explain in Schedule F)	3,708.71
Taxes (explain in Schedule C)	17,940.28
Losses by fire, storms, shipwreck, or other casualty, or theft (submit schedule)	
Bad debts (explain in Schedule D)	499.85
Depreciation (explain in Schedule E)	65,715.19
Amortization of emergency facilities (attach statement)	
Depletion of mines, oil and gas wells, timber, etc. (submit schedule)	
Other deductions authorized by law (explain in Schedule F)	881,241.05
Total deductions in items 14 to 24	
Ordinary net income (item 13 less item 25)	
Short-term capital gain (or loss) (from Schedule C, Summary, Part I, column 4)	
Long-term capital gain (or loss) (from Schedule C, Summary, Part II, column 4)	

THE TAX COURT OF THE U.S.
INT. REV. DOCKET
Los Angeles
APR 17 1952
PETITIONER'S EXHIBIT 2
RESPONDENT'S

ARTHUR McKEE McCLURE
RECEIVED
FEB 14 1950
LOS ANGELES, CALIFORNIA

ONDENT'S EXH A (CONT.)

Total (enter as item 18, page 1) ..... $ 17,240.88

Schedule D.—BAD DEBTS. (See Instruction 20)

2. Net income reported	3. Sales on account	4. Bad debts sustained (specify whether actual or estimated) if no reserve is carried on books	5. Reserve for bad debts at beginning of year	6. Amounts charged against reserve
1941	4,800.57	706,658.66	8,489.77	
1942	85,912.83	1161,654.48	28,946.48	
1943	57,102.82	1375,188.94	193.98	
1944	75,856.73	1471,442.52	499.25	

Check whether deduction claimed represents debts which have become worthless ☑ or is an addition to a reserve ☐.

Schedule E.—DEPRECIATION. (See Instruction 21)

1. Description of property (If buildings, state whether frame or brick construction)	2. Date acquired	3. Cost or other basis (as defined in section 113 (a) (8) (B) of Regulations 111)	4. Depreciation allowed or allowable in prior years	5. Method used in computing depreciation	6. Rate per cent	7. Depreciation for the year	8. Depreciation sustained in prior years if claimed in return for such years	9. Depreciation allowable (Col. 7 plus Col. 8)
		$	$					$
								65,715.19

Taxes and Licenses.

Line 18. Schedule C.

artment Motor Vehicles License	4681.41
es on Business Property	2320.16
y Licenses, Corona, Inglewood, La.	36.00
tractors License	5.00
ghmaster License	44.50
eral Use Stamps	400.00
eral Old Age	2557.78
eral Unemployment Insurance	761.33
te Unemployment Insurance,	6851.86
te Income Tax	302.16
Total Deductions,-	17940.88

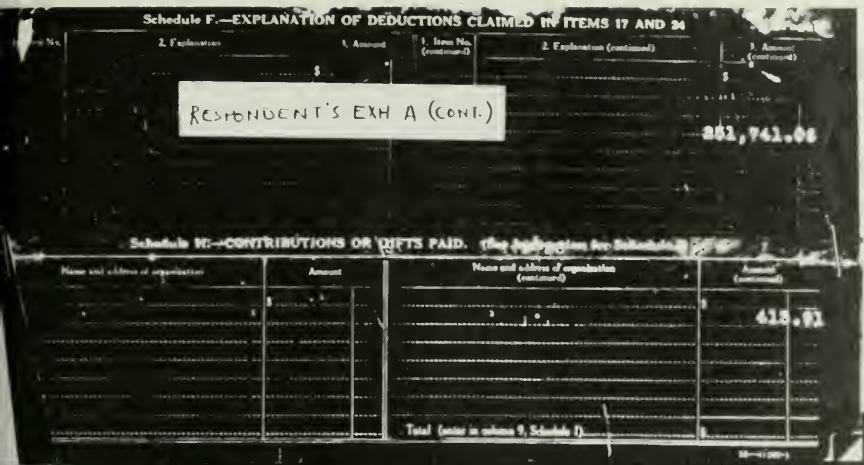
1944
Item 20. Bad Debts Schedule D.

llowing accounts were sold on 30-60 day time and we have not been
o collect in spite of every attempt to do so.

Auger,	3.59	Mr. Cronkright	10.37	Fruit Products	19.86
ade	63.32	Paul Little	26.76	Super Products	16.53
agins	.50	Don Alexander	8.86	Geo. Dawson	13.65
Clanshen	98.43	C.A.Sperks	8.30	Spaulding Ranch	2.91
Watson	2.67	C. R. Smith	65.86	H. A. Stiles	86.76
Burrows,	12.31	Paul H. Lassen	176.31	M. Hammer	83.40

total above 839.79
redit on accounts we collected, formerly charged off 140.54
Net loss Bad debts. 499.25

WC


Schedule F.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 17 AND 24

RESPONDENT'S EXH A (CONT.)

351,741.06

Schedule H.—CONTRIBUTIONS OR GIFTS PAID.

413.91

1944

Item 24. Other Deductions Schedule F.

Insurance PL & PD. Col. P&T	9228.74	Compensation Ins. (Corona)	797.14
Trucks & Equipment,		Compensation Ins., (LA	2105.05
General Insurance	1841.41	Rental of equipment	3441.48
Office expense	2761.18	Telephone & Tel.	4918.18
Power, Light, Water,	7873.32	Eng. & Lab.	881.74
Advertising,	2522.66	Legal expense	200.00
Assn. Dues & Subsc.	830.83	General Expense	3888.87
California Sales Tax deducted here as same included in Income (item-1)			87484.46
Gasoline, Oil, Repairs,	102580.85	Discounts allowed, total	88247.81

1944

Interest

Item 17 Schedule F.

Western Investment Co.,	809.28	Brown Bevis Equip.Co.	478.60
New York Life Ins. Co.	24.34	Ohio Nat'l Life Ins Co.	678.00
No. Am. Life Ins Co.	30.19	Provident Mutual Life	86.67
Penn Mutual Life Ins. Co.	30.28	State Bd of Equalization	1.67
Mutual Life Ins of N.Y.	24.00	Bank of America, LA.	871.07
A.B.Chapman Estate	18.04	Union Bk & Trust Co.	177.71
California Bank.,	807.91		

total interest

DEPRECIATION Claimed.
Item 21- Schedule L.
1944.

Acquired	Kind of Property	Estimated Life	Cost	Previous depretion	1944 Depreciation	Balance to be recovered.
Feb.-36 to Sept.44	Shop-Machinery-Tools,-	From 3 to 10 years.	19,658.04	2,183.30	2,658.69	14,816.05
Jan.-36 to May.-44.	Office Equipment and furnishings	From 4 to 10 years.	2,313.08	1,003.68	266.88	1,040.52
June-36 to Oct.-44.	Business Bldgs, Plants, & fixed equipment.	From 3 to 40 years.	136,884.45	37,719.17	14,208.55	84,956.73
Jan.-36 to Nov.-44.	Trucks, Trailers, cranes, shovels, Mixers, Automobiles, Tractors, Equipment.	From 3 to 5 yrs.	354,695.06	170,653.25	48,581.12	135,460.71
Totals at end of December 1944.---			513,550.63	211,761.40	65,715.19	236,074.96

Schedule I.—PARTNERS' SHARES OF INCOME AND CREDITS. (See Instruction for Schedule I)

Page 4

1. Name and address of each partner (Designate nonresident aliens, if any) If the return of partner or member is filed in another collection district, specify district. If the full time of any partner was not devoted to the business, the percentage of time devoted must be stated	2. Ordinary net income less interest on Government obligations, etc., subject to surtax only (from p. 1, line 7 (a), page 1)	3. Net short-term gain (or loss) from sale or exchange of capital assets (from Schedule G, Summary, line 1, column 4)	4. Net long-term gain (or loss) from sale or exchange of capital assets (from Schedule G, Summary, line 2, column 4)
L. Glenn Switzer, 2/3 3464 E. Foothill Blvd., Pasadena, Calif.	$ 9,201.10		
Howard A. Switzer, 1/3 867 Sierra Madre Ave., Pasadena, Calif.	4,648.87		
Totals	$	$	$

CONTINUATION OF SCHEDULE I

Partially tax-exempt						
6. United States savings bonds and Treasury bonds (line (a), Schedule A)		7. Interest on obligations of certain instrumentalities of the United States (line (b), Schedule A) less amortizable bond premium	8. Dividends on share accounts of Federal savings and loan associations (line (c), Schedule A)	9. Charitable contributions (from Schedule H)	10. Federal income tax paid at source (2 percent of item 4, page 1)	11. Interest [illegible]
a. Principal	b. Interest less amortizable bond premium					
$	$	$	$	$ 275.94 137.97	$	$
$	$	$	$	$	$	$

QUESTIONS

ol organization June 8-1930, Reorg. 3/26-40

e of organization (partnership, syndicate, pool, joint venture,) Partnership.

return of income filed for preceding year? Yes If so, to which ector's office was it sent? Los Angeles, Calif

whether this return was prepared on the cash ☐ or accrual basis.

whether inventories at the beginning and end of the taxable were valued at (a) cost, or (b) cost or market whichever is er No stock kept, no inventory.

If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock

6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No If answer is "Yes," attach list showing name and address of each such corporation and amount of stockholdings.

7. Was return of information on Forms 1096 and 1099, Form W-2 or Form W-2a, filed for the calendar year 1944? Yes (See Instruction H.)

AFFIDAVIT (See Instruction D)

wear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and est of my knowledge and belief is a true, correct, and complete return.

E. E. Ramsey 3/10-45
(Signature of person (other than partner or member) preparing return) (Date)

nsit Mixed Concrete Co.
(Name of firm or employer, if any)

L. Glenn Switzer 3/10-45
(Partner or member) (Date)

3464 E. Foothill Blvd., Pasadena
(Address of partner or member)

rn and sworn to before me this

13th day of March 1945

Lucille Myers Notary Public
(Signature of officer administering oath) (Title)

My Commission Expires Mar. 9, 1947

Subscribed and sworn to before me this

13th day of March 1945

Lucille Myers Notary Public
(Signature of officer administering oath) (Title)

My Commission Expires Mar. 9, 1947

☆ U. S. GOVERNMENT PRINTING OFFICE : 1944 16—41742-1

RESPONDENT'S EXH A (CONT.)

NOT INVESTIGATED

UNITED STATES

Page 1

ORM 1065
ury Department
l Revenue Service

PARTNERSHIP RETURN OF INCOME 1945

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1945

or fiscal year beginning Jan 1st, 1945, and ending Jan 1st, 1946

(File this return with the Collector of Internal Revenue not later than the 15th day of the 3d month following the close of the taxable year)

Do Not Use These Spaces
File Code 2907
Serial No. 8706418
District 6-Calif.
(Date Received)

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

TRANSIT MIXED CONCRETE COMPANY.
(Name)

3464 E. Foothill Blvd.
(Street and number)

Pasadena, California.
(City or town, state number) (State)

RECEIVED
MAR 15 1946
COLL. INT. REV.
LOS ANGELES, CAL.
No. 16

Business or Profession Mixed concrete, Rock-Sand.

GROSS INCOME

ss receipts from business or profession			$ 1,729,486.97
cost of goods sold:			
(a) Inventory at beginning of year		$ 1,042,417.39	
(b) Merchandise bought for sale		347,568.14	
(c) Cost of labor, supplies, etc.			
(d) Total of lines (a), (b), and (c)		$ 1,389,985.53	
(e) Less inventory at end of year			$ 1,389,985.53
ss profit (or loss) from business or profession (item 1 less item 2)			$ 339,510.44
come (or loss) from other partnerships, syndicates, pools, etc. (Show separately names, addresses, and amounts)			
erest on bank deposits, notes, corporation bonds, etc. (except interest to be reported in item 6)			786.25
erest on tax-free covenant bonds upon which a Federal tax was paid at source			
erest on Government obligations, etc.:			
(a) From Schedule A, line (f)			
(b) From Schedule A, line (i)			
nts			791.00
yalties			
gain (or loss) from sale or exchange of property other than capital assets (From Schedule D)			
vidends			
er income (State nature of income) Sale Misc Mtls $700.05—Equip.Rental 20,828.64			
rome Housing project $ 903.79—Diesels serged 154,197.04- Misc.524.50			184,330.02
Total income in items 3 to 12			$ 526,068.71

DEDUCTIONS

ries and wages (do not include compensation for partners)			$ 40,354.90
			4,770.00
ers			
erest on indebtedness (explain in Schedule F)			4,176.46
es (explain in Schedule C)			34,575.97
ses by fire, storm, shipwreck, or other casualty, or theft (attach schedule)			
d debts (explain in Schedule D)			544.78
reciation (explain in Schedule D)			99,865.36
rtization of emergency facilities (attach computation)			
letion of mines, oil and gas wells, timber, etc. (attach schedule)			
er deductions authorized by law (explain in Schedule F)			336,758.58
Total deductions in items 14 to 24			$ 510,736.09
dinary net income (item 13 less item 25)			$ 15,332.71
short-term capital gain (or loss) (From Schedule C Subdivision, Sec 1, column)			$
long-term capital gain (or loss) (From Schedule C Subdivision, Sec 2, column)			$

RECEIVED
REGIONAL AGRICULTURAL ADJUSTMENT BOARD
FEB 14 1950
LOS ANGELES, CALIF.

RECEIVED
TREASURY DEPARTMENT
INTERNAL REVENUE
MAY 1 1947
LOS ANGELES, CALIF.

THE TAX COURT OF THE U.S.
DOCKET
ADMITTED IN EVIDENCE
Los Angeles
APR 17 1952
EXHIBIT 13

:47

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
LOS ANGELES, (12) CALIFORNIA

reply refer to
IT:MP

July 2, 1946

nsit Mixed Concrete Company
34 E. Foothill Blvd.
sadena, California

ntlemen:

An examination of your income tax return for the taxable
ded year 1945, discloses that the affidavit is not
operly executed.

You are requested to return this letter within 10 days from
e date hereof with the affidavit hereon properly executed.

Very truly yours,

Harry C. Westover, Collector

By C. J. Hogan

C. J. Hogan
Chief Income Tax Division

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying
hedules and statements, has been examined by me, and to the best of my
owledge and belief is a true and complete return, made in good faith for
e taxable year stated, pursuant to Section 187 of the Internal Revenue Code
d the Regulations issued thereunder.

orn to and subscribed before me
is 15th day of August 1946.

Signature of Member of Partnership

Notarial
Seal

3464 E. Foothill Blvd Pasadena 8 Cal
Address of partner or member

Wm S. Bailey
gnature of officer administering oath.

Notary Public
(Title)

My Commission Expires Mar. 21, 1950.

RESPONDENT'S EXH. (B. CONT.)

RESPONDENT'S EXH (B CONT.)

Taxes -180

Truck license & tax for year	$7,850.37	
General property tax	2,504.12	
Federal O.A.	5,560.62	
Federal U.I.	1,067.20	
State U.I.	9,613.66	$24,575.97

Schedule C.—TAXES. (See Instruction 18)

Nature	Amount	Nature (continued)	Amount (continued)
	$		$
See Schedule attached.			
		Total (enter as item 18, page 1)	$ 24,575.97

Schedule D.—BAD DEBTS. (See Instruction 20)

Year	2. Net income reported	3. Sales on account	4. Bad debts of organization if no reserve is carried on books	If organization carried a reserve— 5. Gross amount added to reserve	6. Amount charged against reserve
	$ 25,912.65	$1,181,694.49	$ 28,966.62	$	$
	27,182.62	1,376,188.04	103.96		
	13,986.75	1,271,446.84	499.85		
	16,582.71	1,729,406.97	844.78		

Check whether deduction claimed represents debts which have become worthless ☐, or is an addition to a reserve ☐.

Schedule E.—DEPRECIATION. (See Instruction 21)

Property (if buildings, state of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		$	$	$	$			$
Depreciation as per schedule attached								
(enter as item 21, page 1)								$9,858.[illegible]

DEPRECIATION CLAIMED
Item 21, Schedule E.

ired,	Kind of Property	Estimated Life	Cost	Prev. Depreciation	1945 Depreciation	Balance to Recover.
1936		from	20,488.04	8041.96	4618.27	10,727.81
1945	Shop Machinery Tools	5 to 10 yrs.				
936	Office equipment	from 4	2,268.68	1272.56	263.42	726.68
	and	to 10				
945	furniture	years				
-36	Business buildings	from 5	53,029.01	22965.87	2749.63	27,453.51
	Plants and	to				
-45	Fixed equipment	40 yrs	106,787.87	36678.78	10096.47	60,012.62
1936	Trucks, Mixers, tire.	3 to	406,705.51	191760.68	70199.62	144,745.01
	Automobiles	5	3,880.05	2328.63	1569.32	1,758.10
1945.	Shovels, cranes, tract.	years	56,817.45	16469.85	10038.57	30,329.03
$100,000. worth of new and truck & mixer equipment purchased Jan. 1st, 1945.			684,916.76	291580.36	99580.36	271,000.17

JP

Schedule F.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 17 AND 24

No.	2. Explanation	3. Amount	1. Item No. (continued)	2. Explanation (continued)	3. Amount (continued)
17	See schedule	4,176.46	24	See schedule attached	[illegible]

Schedule H.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction for Schedule I)

Name and address of organization	Amount	Name and address of organization (continued)	Amount (continued)
		See schedule attached	[illegible]
		Total (enter in column 9, Schedule I)	

RESPONDENT'S EXH. (B. CONT.)

Interest Paid- Item 17

Western Investment Company	544.80
Bank of American	404.93
California Bank	577.68
Union Bank & Trust Company	43.26
J. F. Pierce	586.26
New York Life Ins	24.34
[illegible]	[illegible]
Provident Mutual	89.61
Brown Bevis Equipment Co.	665.00
A. V. Wagner	750.00
Ohio National Life Insurance	637.05
No. Am. Life Ins. Co.,	39.19
Braman & Dickerson	44.34
	$4,176.46

Bad Debts -Schedule 20.

on Outstanding accounts, disputed and uncollectable

J. Benfield	$2.30	Claude Fox	24.56	
Mannerman Co.	22.31	Jack Justice	6.36	
Johnson Lumber	255.23	H.E.Boyer	66.74	
H. Sorenson	37.99	M. Oilfield	32.63	
United Auto Co	16.61	J.C.McCormick	21.47	
W. H. Wade	15.62	O.K.Oswald	41.00	$625.06
Yellow cab	6.04	Accounts collected		
Cobb Motor Co	50.00	1945, prior bad debts,		80.26
		Net Bad Debt Loss		[illegible]

Other Deductions 24f

Gasoline & Oils	$2,384.44
Truck repairs	95,376.74
Truck Insurance	734.39
Equipment rental	4,147.73
Stationery & Ofc Supplies	2,886.45
Telephone & Telegraph	5,301.99
Power, light & water	9,651.19
General Insurance	11,541.19
Advertising	2,084.08
Association dues	1,394.34
General expense	8,424.49
Discounts allowed,	107,808.35
State Sales tax, same ins in total sales,	38,774.34
	$356,788.65

Schedule I.—PARTNERS' SHARES OF INCOME AND CREDITS. (See Instruction for Schedule I)

Page

1. Name and address of each partner (Designate nonresident aliens, if any) Where return of partner or member is filed in another collection district, specify district If the full time of any partner was not devoted to the business, the percentage of time devoted must be stated	2. Ordinary net income less interest on Government obligations, etc., subject to surtax only (Item 24, page 1, less item 7 (a), page 1)	3. Net short-term gain (or loss) from sale or exchange of capital assets (from Schedule G Summary, line 1, column 4)	4. Net long-term gain (or loss) from sale or exchange of capital assets (from Schedule G Summary, line 2, column 4)
L. Glenn Switzer, 3464 E. Foothill Howard A. Switzer, 267 Sierra Madre Villa Ave, Pasadena.	$ 10,221.81 5,110.90	$	$
Totals	$ 15,332.71	$	$

CONTINUATION OF SCHEDULE I

Partners	Partially tax-exempt: 6. United States savings bonds and Treasury bonds (less (c), Schedule A) a. Principal	6. b. Interest less amortizable bond premium	7. Interest on obligations of certain instrumentalities of the United States (less (b), Schedule A) less amortizable bond premium	8. Dividends on share accounts of Federal savings and loan associations (less (d), Schedule A)	9. Charitable contributions (from Schedule H)	10. Federal income tax paid at source (2 percent of item 8, page 1)	11. Income and profits taxes paid to foreign country or United States possession
a	$	$	$	$	$ 747.72	$	$
b					373.86		
	$	$	$	$	$	$	$

QUESTIONS

Date of organization June 61930, Beorg 3/26-40

Nature of organization (partnership, syndicate, pool, joint venture, etc.) Partnership

Was a return of income filed for preceding year? yes If so, to which collector's office was it sent? Los Angeles

Check whether this return was prepared on the cash ☐ or accrual ☒ basis.

State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market whichever is lower No inventory, no stock held over

If any other basis is used, attach statement describing basis fully state why used and the date inventory was last reconciled with stock

6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a foreign holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No If answer "Yes," attach list showing name and address of each such corporation and amount of stockholdings.

7. Was return of information on Forms 1096 and 1099, or Form W-2 filed for the calendar year 1945? Yes (See Instruction H.)

AFFIDAVIT (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and the best of my knowledge and belief is a true, correct, and complete return.

C. T. Lamme — 3/13-46 (Date)
(Signature of person (other than partner or member) preparing return)

Transit Mixed Concrete Company.
(Name of firm or employer, if any)

Subscribed and sworn to before me this ____ day of ____, 194__

(Signature of officer administering oath) (Title)

L. Glenn Switzer Jr. — 3/13-46 (Date)
(Partner or member)

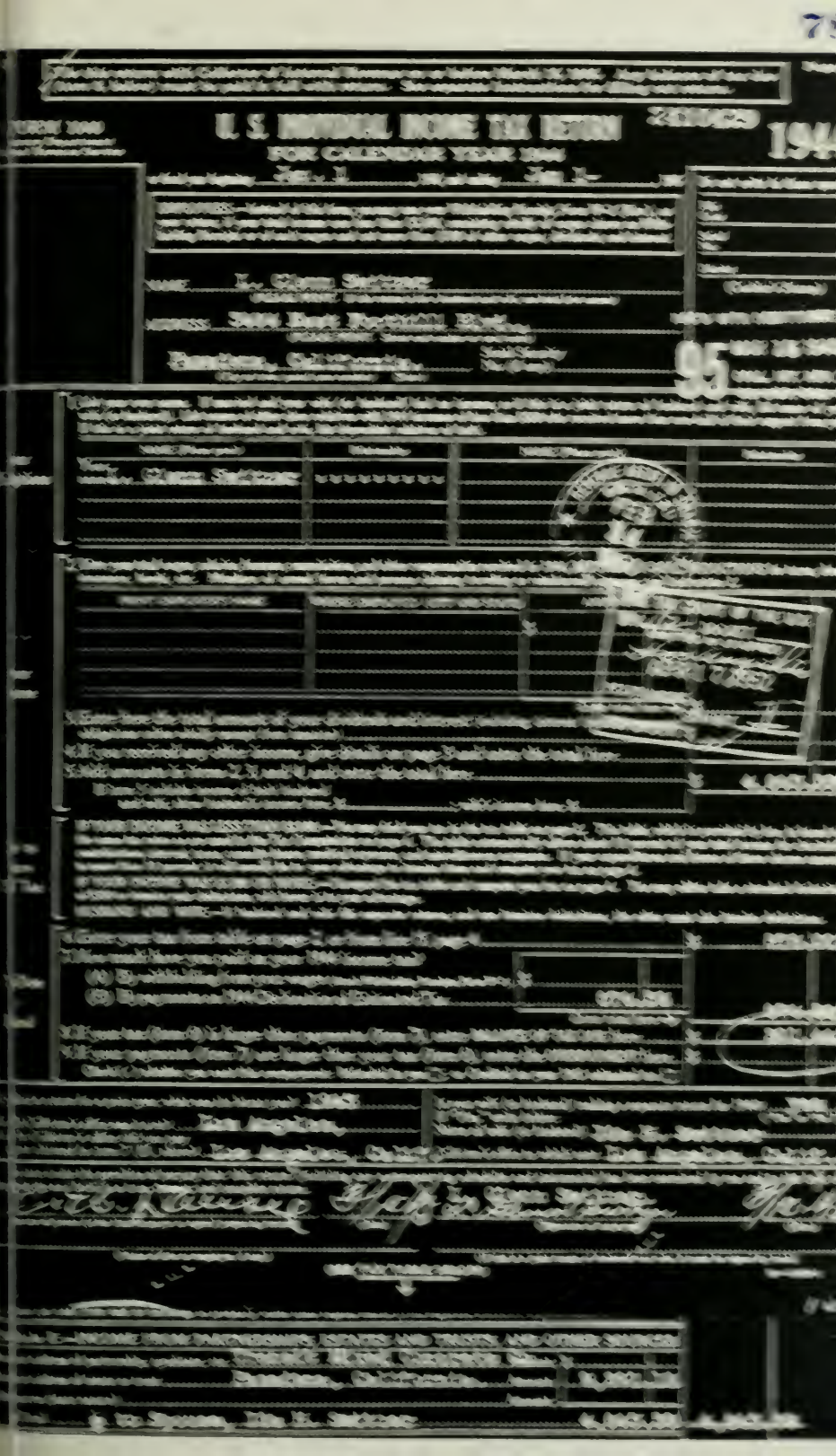
3464 E. Foothill Blvd., Pasadena, Calif.
(Address of partner or member)

Subscribed and sworn to before me this ____ day of ____, 194__

(Signature of officer administering oath) (Title)

16—41202-4

RESPONDENT'S EXH. (B. CONT.)



File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate instructions for filling out return.

Page

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1944

2410429

1944

or fiscal year beginning Jan. 1, 1944, and ending Jan. 1-, 19[illegible]

Do not write in these spaces

File Code

Serial No.

District

(Cashier's Stamp)

REC'D WITH REMITTANCE

MAR 15 1945

COLL. INT. REV.

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and net more than $100 of other wages, dividends, and interest.

NAME L. Glenn Switzer
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 3464 East Foothill Blvd.
(PLEASE PRINT. Street and number or rural route)

Pasadena, California
(City or town, postal zone number) (State)

Social Security No. (if any)

95

Your exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

NAME (Please print)	Relationship	NAME (Please print)	Relationship
Your name L. Glenn Switzer	x x x x x x x x x		

REVENUE AGENT-IN-CHARGE RECEIVED FEB 12

Your income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

PRINT EMPLOYER'S NAME	WHERE EMPLOYED (CITY AND STATE)	AMOUNT
		$

UNITED STATES TAX COURT OF THE U.S. DIV. 12 DOCKET ADMITTED IN EVIDENCE APR 17 1952 PETITIONER'S EXHIBIT I

3. Enter here the total amount of your dividends and interest (including interest from [illegible] obligations unless wholly exempt from taxation) Enter total here → $

4. If you received any other income, give details on page 3 and enter the total here

5. Add amounts in items 2, 3, and 4, and enter the total here $ 4,645.58

If item 5 includes income of both husband and wife, show husband's income here, $; wife's income here, $

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the tax table on page 2. This table, which is provided by law, is based on the same tax rates as are used in the Tax Computation on page 4. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 4.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4 $ 874.00

7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (Attach Withholding Receipts, Form W-2). $

(B) By payments on 1944 Declaration of Estimated Tax 674.56

Enter total here → $ 674.56

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here $ 201.44

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here $

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1945 estimated tax ☐

ou filed a return for a prior year, what was the latest year? 1943

which Collector's office was it sent? Los Angeles,

which Collector's office did you pay amount claimed in item 7 (B), above? Los Angeles, Calif

Is your wife (or husband) making a separate return for 1944? Yes ("Yes" or "No")

If "Yes," write below:
Name of wife (or husband) Ida H. Switzer

Collector's office to which sent Los Angeles, Calif.

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

[illegible] 3/10/45
(Signature of person (other than taxpayer or agent) preparing return) (Date)

L. Glenn Switzer 3/10/45
(Signature of taxpayer) (Date)

(Name of firm or employer, if any)

(If this is a joint return of husband and wife, it must be signed by both)

16—41888-1

SEE TAX TABLE BELOW

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc. Transit Mixed Concrete Co.	Amount, $		
Name and address of estate or trust Pasadena, California	Amount.	9,291.16	
Other sources (state nature)	Amount.		
Total ½ to Spouse, Ida H. Switzer		4,645.58	4,645.58

File this return with Collector of Internal Revenue on or before March 15, 1946. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filling out return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1945

1945

or fiscal year beginning Jan. 1, 1945, and ending Jan. 1, 1946

Do not write in these spaces

File No. 764-1737

District

(Cashier's Stamp)

RECEIVED
MAR 15 1946
6th Coll. Dist.

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2, as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipt, or of such wages and not more than $100 of other wages, dividends, and interest.

CREDIT ALLOWED
Amount $ 8[illegible]
Bch. No.
Est. # 595863

NAME L. Glenn Switzer
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 3464 E. Foothill Blvd.
(PLEASE PRINT. Street and number or rural route)

6th DIST OF CALIF. Pasadena 8, California.
(City or town, postal zone number) (County) (State)

(Occupation) Social Security No.

Your Exemptions

List your own name.
If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

Name (please print)	Relationship	Name (please print)	Relationship
1. Your name L. Glenn Switzer	x x x x x x x x x		

List names of other close relatives (as defined in Instruction 1) with 1945 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

RECEIVED
FEB 14

Your Income

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1945, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. (Include armed forces pay and allowances and persons claiming traveling or reimbursed expenses.)

Print Employer's Name	Where Employed (City and State)	$
2.		

Enter total here → $

3. Enter here the total amount of your dividends and interest (including interest from ... ernment obligations unless wholly exempt from taxation) ...

4. If you received any other income, give details on page 2 and enter the total here ... 10,221.91

5. Add amounts in items 2, 3, and 4, and enter the total here ... $

If item 5 includes incomes of both husband and wife, show husband's income here, $ 5,110.91 ... wife's income here, $ 5,110.90 ... to each spouse

THE TAX COURT OF THE U.S.
DIV. DOCKET
ADMITTED IN EVIDENCE
APR 17 1952
PETITIONER'S
EXHIBIT
RESPONDENT'S

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000. You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 2.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 2. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 4, or from line 15, page 3 ... $ 992.46

7. How much have you paid on your 1945 income tax?
(A) By withholding from your wages ... $
(B) By payments on 1945 Declaration of Estimated Tax ... 1,080.00
Enter total here → 1,080.00

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here ... $

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here ... $ 87.54
Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1946 estimated tax ☒

If you filed a return for a prior year, what was the latest year? 1944

To which Collector's office was it sent? Los Angeles

To which Collector's office did you pay amount claimed in item 7 (B), above? Los Angeles

Is your wife (or husband) making a separate return for 1945? Yes ("Yes" or "No")
If "Yes," write below:
Name of wife (or husband) Ida E. Switzer
Collector's office to which sent Los Angeles.

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

C. W. Lewis 3/14/46
(Signature of person (other than taxpayer or agent) preparing return) (Date)

L. Glenn Switzer
(Signature of taxpayer) (Date)

Franklin Lloyd Concrete Company
(Address (Employer, if any))

(If this is a joint return of husband and wife, it must be signed by both)

16—42702-1

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	$ 5,110.91	
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $500)	500.00	
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$ 4,610.91	
4. Enter your Normal-Tax Exemption ($500 if return includes income of only one person, otherwise see Tax Computation Instructions)	500.00	
5. Subtract line 4 from line 3. Enter the difference here. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)	$ 4,110.91	
6. Enter here 3 percent of line 5. This is your Normal Tax. (Figure your Surtax below and enter in line 10)		$ 123.33
7. Copy the figure you entered on line 3, above	$ 4,610.91	
8. Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1)	500.00	
9. Subtract line 8 from line 7. Enter the difference here. This is your Surtax Net Income	$ 4,110.91	
10. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 9. Enter the amount here		869.10
11. Add the figures in lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 13 of Schedule D)		$ 992.46

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 28256

L. GLENN SWITZER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

1. The petitioner, L. Glenn Switzer, represents that on the 5th day of October, 1953, The Tax Court of the United States entered a decision holding that there are deficiencies in the income tax liability and penalties due from this petitioner, as follows:

Year	Deficiency	5% Negligence Penalty
1944	$ 2,258.86	$112.94
1945	11,074.91	553.75

The petitioner asks a review of said decision by this Court, the United States Court of Appeals for the Ninth Circuit.

2. The controversy involves two issues, in which petitioner's position is as follows:

(a) The Tax Court erred in holding that the five year period of limitations on assessment of deficiencies as provided in Section 275(c) of the Internal Revenue Code [26 U.S.C.A., Sec. 275(c)] is applicable in this case; and

(b) The Tax Court erred in holding that the 5% negligence penalty provided by Section 293(a) of the Internal Revenue Code [26 U.S.C.A., Sec. 293(a)] is applicable in this case.

3. The petitioner resides in the County of Los Angeles, State of California, and the income tax returns for the years in question were filed with the Collector of Internal Revenue at Los Angeles, California, all within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Wherefore, the petitioner prays that this Court review said decision of The Tax Court of the United States pursuant to the applicable statutory provisions and the Rules of this Court.

Dated: December 30, 1953.

/s/ WILLIAM A. CRUIKSHANK, JR.,
Attorney for Petitioner

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed January 4, 1954.

[Title of U.S. Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Tax Court:

You will please transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above entitled

cause in connection with the petition for review by said Court of Appeals for the Ninth Circuit heretofore filed by L. Glenn Switzer:

1. Docket entries of the proceedings before the Tax Court.

2. Pleadings before the Tax Court:

(a) The petition including the annexed copy of the deficiency letter.

(b) The answer.

(c) Respondent's amended answer.

(d) Petitioner's reply to amended answer.

(e) Respondent's amendment to amended answer.

(f) Petitioner's reply to amendment to amended answer.

3. Findings of fact, opinion and decision of the Tax Court.

(a) Findings of fact and opinion promulgated June 30, 1953.

(b) Judgment entered on or about October 5, 1953.

4. Petition for review of the decision of the Tax Court and assignment of error, together with proof of service of notice of filing the petition for review and service of a copy of the petition for review.

5. Stipulation of facts received in evidence.

6. All exhibits filed in evidence are to be transmitted to the Clerk of the Court of Appeals for the Ninth Circuit in physical form.

7. This praecipe.

/s/ WILLIAM A. CRUIKSHANK, JR.,
Attorney for Petitioner.

[Endorsed]: T.C.U.S. Filed Jan. 11, 1954.

[Title of U.S. Court of Appeals and Cause.]

NOTICE OF FILING DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To: Daniel A. Taylor, Chief Counsel, Internal Revenue Service.

You are hereby notified that L. Glenn Switzer did on the 11th day of January, 1954, file with the Clerk of The Tax Court of the United States, at Washington, D.C., a designation of contents of record on review for the Ninth Circuit, in the above-entitled case. Copy of the designation of contents of record on review as filed is hereto attached and served upon you.

Dated this 11th day of January, 1954.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed Jan. 11, 1954.

The Tax Court of the United States
Washington

[Title of Causes 28256-7-8-9.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 49, inclusive, constitute and are all of the original papers and proceedings on file in my office, including Exhibits A through N, as called for by the "Designations as to Contents of Record on Review," and including also the official transcript of proceedings before this Court on April 17, 1952, in the proceedings before The Tax Court of the United States in the above entitled proceedings and in which the petitioners in The Tax Court proceedings have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 18th day of January, 1954.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

[Endorsed]: No. 14217. United States Court of Appeals for the Ninth Circuit. L. Glenn Switzer, Ida H. Switzer, Howard A. Switzer and Florence M. Switzer, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed: January 30, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For The Ninth Circuit

No. 14217

L. GLENN SWITZER, et al,
Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS UPON WHICH PETITIONERS INTEND TO RELY AND DESIGNATION OF RECORD

Come now petitioners, L. Glenn Switzer, Ida H. Switzer, Howard A. Switzer and Florence M. Switzer, and cite the following points upon which they intend to rely for reversal of the judgment of the Tax Court, Hon. Stephen E. Rice, Judge:

1. The Tax Court erred in holding that only the net income of the partnership in question which was distributable to the petitioners is a part of their respective gross incomes for purposes of Section 275 (c) of the Internal Revenue Code, and that, therefore, the five year period of limitations on the assessment of income tax deficiencies is applicable in these cases.

2. The Tax Court erred in holding that the evidence was sufficient to support a finding that petitioners L. Glenn Switzer and Howard A. Switzer were negligent in keeping their accounts and rendering their income tax returns, and that, therefore, the 5% negligence penalty under Section 293 (a) of the Internal Revenue Code should be imposed against each of said petitioners.

The petitioners designate the entire record as certified by the Tax Court to the Court of Appeals for the Ninth Circuit as necessary for a consideration of the points upon which they intend to rely.

Dated this 10th day of February, 1954.

BAIRD & CRUIKSHANK
/s/ By WILLIAM A. CRUIKSHANK, JR.
Attorney for Petitioners.

[Endorsed]: Filed February 11, 1954. Paul P. O'Brien, Clerk.

[Title of U.S. Court of Appeals and Cause.]

STIPULATION FOR CONSOLIDATION

It is hereby stipulated by the parties hereto through their attorneys that the four above captioned cases may be consolidated for review by the United States Court of Appeals for the Ninth Circuit.

BAIRD & CRUIKSHANK
/s/ By WILLIAM A. CRUIKSHANK, JR.
Attorneys for Petitioners.
/s/ H. BRIAN HOLLAND,
Assistant Attorney General,
Attorney for Respondent.

So ordered:

/s/ WILLIAM DENMAN,
Chief Judge.
/s/ WM. HEALY,
/s/ HOMER T. BONE,
United States Circuit Judges

[Endorsed]: Filed Mar. 3, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION RE: TRANSCRIPT OF RECORD

To the Court of Appeals for the Ninth Circuit:

It is hereby stipulated and agreed by the parties hereto, through their respective counsel, that the

questions presented in the appeals of petitioner, L. Glenn Switzer and Howard A. Switzer are identical, except as to differences in amounts involved; and that the questions presented in the appeals of Ida H. Switzer and Florence M. Switzer are identical, except as to differences in amounts involved.

It is further stipulated and agreed that the principal question presented in each of the four appeals, relating to the statute of limitations, is identical, but that the appeals of Ida H. Switzer and Florence M. Switzer do not involve the secondary issue relating to the negligent penalties presented in the appeals of L. Glenn Switzer and Howard A. Switzer.

Accordingly, it is agreed that only the pleadings, stipulations and exhibits from the Tax Court in the case of L. Glenn Switzer need be printed in the record for consideration by this Court, and that such documents from the Tax Court in the cases of the other petitioners need not be so included in the printed record for this Court, but any part thereof may be printed in appendices to the briefs of the parties and may be considered by the Court.

BAIRD & CRUIKSHANK

/s/ By WILLIAM A. CRUIKSHANK, JR.

Attorneys for Petitioners.

/s/ H. BRIAN HOLLAND,

Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C., Attorney for Respondent.

[Endorsed]: Filed Mar. 23, 1954. Paul P. O'Brien, Clerk.

No. 14217.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. GLENN SWITZER, *et al.*,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Consolidated Review of Decisions of the Tax Court of the United States.

BRIEF FOR PETITIONERS.

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No. 14217.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. Glenn Switzer, *et al.*,

Petitioners,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONERS.

JURISDICTION.

This is a petition to review four decisions of the Tax Court of the United States entered October 5, 1953. These four decisions have been consolidated for review by this Court. [R. 88.]

The cases involve the income tax liability for the calendar years 1944 and 1945. [R. 81.] Notices of Deficiency with respect to those years were mailed to each of the petitioners on February 24, 1950 [R. 24]; each of said petitioners filed petitions for redetermination of the proposed deficiencies with the Tax Court on May 15, 1950. [R. 1.] The Tax Court of the United States has jurisdiction of such actions under the provisions of Sections 1101 and 272 of the Internal Revenue Code. Petitions for Review and an affidavit of service thereof upon counsel for respondent were filed January 4, 1954. [R. 3 and 81.]

The income tax returns of each of the petitioners for each of the years involved were filed with the Collector

of Internal Revenue for the Sixth District of California at Los Angeles [R. 78 and 79], and a partnership return was filed with the same collector for each of those years. [R. 69 and 73.] Each of the petitioners is a resident of Los Angeles County in the State of California. [R. 4 and 82.] The United States Court of Appeals for the Ninth Circuit has jurisdiction to review these decisions of the Tax Court under the provisions of Section 1141 of the Internal Revenue Code. The pleadings showing the existence of the jurisdiction of the Tax Court [R. 4 and 12], and that showing the jurisdiction of the Court of Appeals for the Ninth Circuit [R. 81] are set forth in the transcript of record herein.

STATEMENT OF THE CASE.

Petitioners, L. Glenn Switzer and Howard A. Switzer, were partners during the years 1944 and 1945, doing business as such in Pasadena, California, under the firm name of Transit Mixed Concrete Company. [R. 23.] L. Glenn Switzer owned a two-thirds interest in said partnership constituting the community property of himself and his wife, petitioner Ida H. Switzer, under California law; Howard A. Switzer owned a one-third interest in said partnership constituting the community property of himself and his wife, petitioner Florence M. Switzer, under California law. [R. 23-24.] All of the income of the four petitioners in said years was derived from their community property ownership of said partnership interests. [R. 24.]

The partnership return of income and an individual income tax return for each of the petitioners were timely filed for each of said years, that is on or before March 15, 1945 and March 15, 1946, respectively. [R. 24.] A Notice of Proposed Deficiencies for 1944 and 1945 was

mailed to each petitioner on February 24, 1950, more than three years, but less than five years, after the returns had been filed. [R. 24.]

The income tax deficiencies proposed in said notices resulted from additions to the partnership income in the amount of $20,489.80 for 1944 and $68,193.60 for 1945. When the added amounts are compared to the amounts reported by the partnership, they appear as follows, expressed as a percentage of the amount reported:

PARTNERSHIP PERCENTAGE OMITTED.

	1944	1945	
Partnership Gross Receipts	1.5%	3.9%	[R. 25]
Partnership Gross Income	5.32%	12.96%	[R. 24]
Partnership Net Income	147.01%	444.01%	[R. 24, 33]

Each of the petitioners omitted from his individual returns gross income equal to 5.32% and 12.96% of the gross income reported therein for 1944 and 1945, respectively, if his gross income includes his share of partnership gross income; but he omitted gross income equal to 147.01% and 444.01% of that reported for the respective years if his gross income includes only his share of the partnership net income.

The percentage of gross income omitted is the critical question in these cases, since the only basis upon which the position of the Respondent may be sustained is that the gross income omitted exceeds 25 per cent of that reported.* If it does, Section 275(c) of the Internal Rev-

*It was stipulated that the three-year period of limitations was not extended by the execution of a consent to such extension by any of the petitioners. [R. 65.] The Tax Court found that no part of the deficiencies determined against the petitioners was due to fraud [R. 26], and that the returns had been filed on time. [R. 24.] Thus, there is no other exception to the Statute of Limitations applicable.

enue Code allows a five-year period within which deficiencies may be assessed, and the respondent's Notices of Deficiency were timely. If the omissions do not exceed 25 per cent of the reported gross income, the basic statutory limitation period under Section 275(a) of the Internal Revenue Code bars the proposed assessments since the Notices of Deficiency were mailed more than three years after the filing of the returns.

A secondary question is presented only if this Court holds that the five-year period of limitations applies and the Notices of Deficiency were therefore timely. That second question is whether the evidence supports the Tax Court's finding [R. 27] that part of each of the tax deficiencies asserted against the two petitioners, L. Glenn Switzer and Howard A. Switzer, is due to negligence within the meaning of Section 293(a) of the Internal Revenue Code. On the basis of that finding, the Tax Court added that 5 per cent negligence "penalty" to the deficiencies asserted against these two petitioners. [R. 33.]

The Statute of Limitations question was raised in the Notice of Deficiency since the Respondent was required to show some exception to the normal limitation period. [R. 9.] This was designated as erroneous in the petition filed by the petitioners. [R. 4-5.] The negligence question was first raised by the allegations of the respondent in an amendment to his Amended Answer [R. 19], which allegations were denied by the petitioners in replies to the Amendment to the Amended Answer. [R. 20.]

SPECIFICATION OF ERRORS.

1. The Tax Court erred in holding that a partner's gross income includes only his share of partnership *net* income, rather than his share of partnership *gross* income. [R. 37.] As a result of this error it concluded that more than 25 per cent of the gross income reported by the petitioners had been omitted by them and that the five-year period of limitations under Section 275(c) of the Internal Revenue Code applied. [R. 37.]

2. The Tax Court erred in making the following findings of fact, which findings are not supported by the evidence:

> "a. Part of the deficiencies for each of the taxable years determined against the husbands (Petitioners L. Glenn Switzer and Howard A. Switzer) was due to negligence within the purview of section 293(a) of the Internal Revenue Code.
>
> "b. Each of the petitioners for each of the taxable years omitted gross income in excess of 25 per cent of the amount of gross income stated in his or her return, and the deficiencies were timely asserted within the five-year period provided by section 275(c) of the Internal Revenue Code." [F. of F., R. 27.]

3. The Tax Court erred in holding that the five per cent addition to the tax for negligence under Section 293(a) of the Internal Revenue Code is applicable with respect to petitioners L. Glenn Switzer and Howard A. Switzer. [R. 33.]

SUMMARY OF ARGUMENT.

I. The sole question presented in the principal issue here involved is whether a partner's gross income includes his share of partnership gross income, or only his share of partnership net income, for the purpose of Section 275(c) of the Internal Revenue Code.

II. Section 275(c), or identical predecessor subsections, have been included in the revenue laws for twenty years. Several cases have been decided concerning this subsection, but none is particularly helpful in deciding the present question. It is well established that the respondent has the burden of proof in a case of this type where he seeks to apply an exception to the normal period of limitations on assessment of income tax deficiencies. The question herein presented requires a consideration of a partnership under state law and, more particularly, the federal tax laws.

III. Under the state law applicable to the partnership in question, a partnership is not an entity but an association or aggregation of co-owners carrying on a joint business enterprise.

IV. Under the federal tax laws a partnership is similarly treated as an aggregation of its members, except in certain special situations for which the Internal Revenue Code prescribes specific rules to the contrary. Basically, each member of a partnership is considered, for income tax purposes, to be carrying on his share of the partnership business individually.

V. The foregoing concept of a partnership for tax purposes has been recognized in several court decisions, in rules and regulations promulgated by the respondent, and by legislation of the Congress of the United States. The Tax Court and the respondent have both held that a partner's gross income includes his share of partnership gross income in other situations.

VI. Recent reports by committees of both Houses of the Congress, in connection with the proposed Revenue Code of 1954, have stated that, under existing law applicable to the cases herein presented to this Court, a partner's gross income includes his share of partnership gross income for the purpose of Section 275(c). In other words, the Congress has clearly indicated that the intent behind Section 275(c) is consistent with the contention of the petitioners herein and not with that of the respondent.

VII. This Court need not consider the negligence penalties imposed by the Tax Court upon two of the four petitioners herein unless it affirms the Tax Court on the Statute of Limitations question. If this Court does affirm the Tax Court on that question, it must consider the negligence question. The respondent had the burden of proving the negligence alleged by him. He introduced no evidence of negligence. The Tax Court sustained the proposed penalties solely on the basis of the size of the discrepancies between the reported and the corrected taxable income of these petitioners. Such a conclusion is clearly erroneous and amounts to an automatic imposition

of the penalty in the case of a substantial deficiency, irrespective of the reason for the deficiency.

VIII. In conclusion, a partner's gross income includes his share of partnership gross income. By reporting his distributive share of partnership net income in his individual return, in the manner required by the Internal Revenue Code and the respondent's regulations, a partner has *"stated in the return"* his share of the partnership gross income. In no other manner consistent with the law and the applicable regulations can he state in the return his gross income from partnership operations. Accordingly, Section 275(c) does not apply in these cases since 25 per cent of reported gross income was not omitted by any of the petitioners in either of the years. The proposed deficiencies are, therefore, barred by the three-year Statute of Limitations under Section 275(a) and the decisions of the Tax Court should be reversed.

In any event, the negligence penalties and the finding upon which they are based are without the support of any evidence presented to the Tax Court.

ARGUMENT.

I.

Introductory.

The principal question presented in these consolidated cases concerns the application of the Statute of Limitations on assessment of income tax deficiencies. The ordinary three-year period of limitations expired prior to the initiation by the respondent of the assessment process by the mailing of his Notices of Deficiency. Since no other exception to that ordinary Statute of Limitations is applicable, the respondent relies upon Section 275(c) of the Internal Revenue Code, which allows a five-year period for such assessment if it is found that the facts stated in that section exist.

Section 275(c) reads as follows:

> "(c) Omission from Gross Income.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed."

Since all of the income of the petitioners, as reported and as corrected, was derived from the partnership, the application of Section 275(c) requires a determination of the amount of gross income of the petitioners from the partnership. Simply stated, the question is whether the gross income of a partner includes his share of partnership gross income or his share of partnership net income.

If the Court determines that a partner's gross income is his share of partnership gross income, these petitioners omitted far less than the 25 per cent required for the application of Section 275(c); if the Court determines that a partner's gross income is his share of partnership net income, these petitioners omitted far more than the required 25 per cent, and the respondent, as well as the Tax Court, was correct.

An example may clarify the situation and explain the great difference in the percentage omitted resulting from the determination of this principal question. Let us assume the following hypothetical situation:

Partnership Gross Income	$100,000.00
Partnership Deductible Expenses	95,000.00
Partnership Net Income	$ 5,000.00

Each of the two equal partners would then have reported as his individual share of the partnership net income, the sum of $2,500.00 Carrying this example further, we may assume that there was omitted from partnership gross income the sum of $10,000.00. The individual would then have omitted gross income equal to 10 per cent of his reported gross income, or 200 per cent of his reported gross income, depending upon whether his gross income is his share of partnership gross income or his share of partnership net income.

The application of Section 275(c) would depend upon the answer to this question in the hypothetical example just as it does in these cases presented to the Court for review.

Incidentally, the income tax returns of the petitioners and the partnership information returns were received in evidence by the Tax Court as respondent's Exhibits "A" to "J," inclusive. Photostatic copies thereof are included in Transcript of Record herein. [R. 69-79.] These copies show that the returns were accepted and/or not investigated by the respondent. The inescapable conclusion is that the omitted income was discovered and disclosed to the respondent by the petitioners voluntarily, but that this discovery and disclosure did not occur until the three-year period of limitations had expired. There is no fraud involved in the factual background of these proceedings. The Tax Court so held. [R. 31.] No inference adverse to the petitioners in the solution of the principal question should be drawn from the fact that there were relatively minor errors in bookkeeping on the part of their large, active business organization during wartime, when it had gross annual receipts of $1,291,-937.40 and $1,797,680.57. While it may be said that these errors should have been discovered by the respondent, as well as by the petitioners, during the three-year period following the filing of the returns, the well-established purpose of statutes of limitations is to close the door on stale claims and prevent the assertion of liability for years long past. An *exception* to the basic period established by the Internal Revenue Code should be allowed *only* where the facts giving rise to the application of that exception are *clearly* established.

II.

History of Section 275(c).

Section 275(c) first appeared as a corresponding subsection in the Revenue Act of 1934. The committee report which accompanied the bill stated that the purpose of the new subsection was to deny the privilege of the ordinary three-year Statute of Limitations to "taxpayers who are so negligent as to leave out of their returns items of such magnitude" (more than 25 per cent of the gross income reported). [House Ways & Means Committee Rept., No. 704, 73d Cong. 2d sess., p. 35; also reported at Cum. Bull., 1939-1 (Part 2) 554, 580.]

Since this subsection provides an exception to the Statute of Limitations, the respondent carries the burden of proof necessary to establish the exception, as has been held by the Tax Court in *C. A. Reis v. Comm.,* 1 T. C. 9 (1942).

An examination of Section 275(c) discloses that the facts to be proved by the respondent to establish the application of that section are: (1) The amount of gross income stated in the return; (2) The amount of omitted gross income that was properly includible therein; and (3) The omitted gross income expressed as a percentage of that reported.

There have been several cases decided by the Tax Court and other courts concerning Section 275(c). Many of these cases have been concerned with a determination of gross income with respect to capital gains, how to treat certain expenditures, etc. Some of the cases have been concerned with the question of the amount of gross income stated in the return and whether items listed on a schedule attached to the return or in the return of a

related taxpayer are stated in the return for the purpose of this subsection. With the exception of the decision of the Tax Court in these cases now before this Court, there has been no case under Section 275(c) that is in point or particularly helpful in arriving at the answer to the questions herein presented.

No specific statute or regulation defines gross income in this situation, although Section 22(a) does define gross income in an all-inclusive manner. The questions here require an examination of the nature of partnerships under state law and under federal tax law.

III.

Nature of a Partnership Under State Law.

In California as in most states, the common law concept of a partnership has been maintained. That concept is that a partnership is an aggregate of its members who operate the partnership business as co-owners. The Uniform Partnership Act has been adopted in California and incorporated in the Corporations Code. A partnership is defined thereunder as "an association of two or more persons to carry on as co-owners a business for profit." [Cal. Corp. Code, Sec. 15006(1).]

The Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, has said:

> "The Uniform Partnership Act * * * did not, * * * make the firm an independent juristic entity. * * * (T)he Conference in 1911 after a very full discussion chose to retain the pluralistic notion of the firm, as the English chancellors had painfully worked it out from the bare common-law, which recognized only joint owners and joint obligors." [*Helvering v. Smith* (C. C. A. 2d, 1937), 90 F. 2d 590, 591.]

IV.

Nature of a Partnership Under Tax Law.

The law concerning the taxation of income derived from partnership operations has also adopted the aggregate theory as its basic principle. The initial section in that portion of the Internal Revenue Code dealing with partnerships provides:

> "Sec. 181. Partnership Not Taxable. Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

The following sections of the Internal Revenue Code provide very briefly for the special rules applicable in determining the income and income tax liability of partners. Only in very limited cases have exceptions been made in the basic aggregate concept of partnerships. For example, commercial custom and administrative convenience demand that the fiscal year and accounting methods adopted by the partnership as a commercial, though not legal entity, be recognized for tax purposes. The chaos resulting from the application of a different rule to a partnership consisting of several dozen members undoubtedly inspired this mechanical rule which is now set forth in Section 188. For the same reason the bookkeeping unit is realistically recognized in the requirement that a single information return be filed on behalf of all of the partnership members (Sec. 187), rather than that each member duplicate on his individual return all of the items of income, deductions and credits applicable to the partnership operation.

As stated in *United States v. Coulby* (D. C. Ohio, 1918), 251 Fed. 982, 984, aff'd *Per Curiam* (C. C. A. 6th, 1919), 258 Fed. 27:

> "The Congress, consequently, it would seem, ignored, for taxing purposes, a partnership's existence, and placed the individual partner's share of its gains and profits on the same footing as if his income had been received directly by him without the intervention of a partnership name."

The Board of Tax Appeals has also stated this well-settled principle of tax law as follows in *Goadby Mills v. Comm.,* 3 B. T. A. 1245, 1249 (1926):

> "In the enactment of section 218(a) Congress ignored for taxing purposes the existence of the partnership and framed the law so as to treat the gains and profits of the partnership as if they were gains and profits of the individual partners. Unlike a corporation, a partnership has no legal existence aside from the members who compose it; consequently, in order that the profits of the partnership might not escape taxation, Congress provided that its income should be taxed to the individual partners, the same as if they received it direct without the intervention of the partnership."

The Court of Claims has recognized this principle as follows in *Craik v. United States,* 31 F. Supp. 132, 133, 135 (1940):

> "An examination of the various income tax Acts, beginning with the first one of 1913, shows that Congress in the enactment of each of them intended to treat partnership income as though the distributive share of each partner therein had been received directly by the partner. (p. 133.) * * * We are

convinced that Congress intended that partnership income should be treated as though it had been received by the partners individually." (p. 135.)

In *Jennings v. Comm.* (C. C. A. 5th, 1940), 110 F. 2d 945, 946, the Court of Appeals for the Fifth Circuit has stated:

"A partnership is recognized as an entity separate from the partners in bankruptcy proceedings, but not in income taxation.

"The partnership return is for information, and to secure uniformity and save repetition in the individual returns. It ascertains each partner's gain and apportions it to him to be taxed, whether distributed or not. It does not transform his share in the gain."

V.

Partnership Under Specific Sections of the Internal Revenue Code.

Not only has the aggregate theory been recognized as the fundamental principle upon which our tax law treats partnership income, but that principle has been applied to several specific situations. While none of these authorities deals with Section 275(c), they each hold that in determining the character, the source and the amount of a partner's income, we must divide the partnership and treat each member's share of the income as if he had earned it individually.

In *Craik v. United States,* 31 F. Supp. 132 (1940), the Court of Claims held that a non-resident alien who was a member of a partnership engaged in business within the United States must be considered as being himself engaged in business within the United States to the extent

of his interest in the partnership. The Court also held that the partnership income received from sources without the United States should be treated as if the non-resident alien partner had received it directly. Accordingly, his share of such income from without the United States is not taxable here.

In *Jennings v. Comm.,* 110 F. 2d 945 (1940), the Fifth Circuit held that a partner could deduct individual gambling losses to the extent of his gambling gains, including his share of gambling gains of the partnership. In other words, that Court disregarded the partnership in determining the nature of the income derived from the partnership.

Under the provisions of the Revenue Act of 1932, losses from the sale of securities were deductible only to the extent of the taxpayer's gains from sale of such assets. In the case of *Neuberger v. Comm.,* 311 U. S. 83 (1940), the Supreme Court held that an individual's gains from security transactions included his share of such gains realized by a partnership of which he was a member, thereby recognizing the aggregate nature of a partnership under income tax law.

In another situation the Second Circuit has clearly stated and applied this principle of tax law. Section 24(b)(1)(B) of the Internal Revenue Code prohibits any deduction in computing net income for losses from sales of property, generally, between an individual and his controlled corporation. Does this apply to sales by a partnership of which the stockholder is a member? The Code does not specifically provide an answer, but the Court of Appeals for that circuit held that losses on such sales were within that section. (*Comm. v. Whitney* (C. C. A.

2d, 1948), 169 F. 2d 562, cert. den. 335 U. S. 892.) At page 568 the Court said:

> "There is no doubt that generally speaking under the tax law we must approach the partnership as an association of individuals who are co-owners of its specific property * * *."

In the *Whitney* case, *supra,* the Court quoted with approval the following:

> "In too many instances the Treasury and the courts have shied away from the plain implications of the statutory scheme: an income tax imposed upon the partners as individuals. Basically, the tax law adopts the common law concept of the partnership as an aggregate of individuals operating the properties of the partnership as co-owners."
>
> Rabkin and Johnson, "The Partnership under the Federal Tax Laws," 55 Harv. L. Rev. 909, 949.

In still another situation the Third Circuit has applied this basic concept to a specific problem under the Internal Revenue Code. Section 502(f) provides that "personal holding company income," upon which the severe personal holding company corporate surtax is based, includes rent received by a corporation for the use of its property by an *individual* owning 25 per cent or more of the corporation's outstanding stock. Does rent received by a corporation under a lease of its property to a partnership composed of its shareholders come within the classification? Is a partnership's right to use property equivalent to the partners' right to use that property, for tax purposes? It was so held in *Randolph Products Co. v. Manning* (C. A. 3rd, 1949), 176 F. 2d 190. To the same effect, see *Western Transmission Corporation,* 18 T. C. 818 (1952).

In a recent case, the Tax Court has expressly recognized that a *partner's gross income includes his share of partnership gross income.* That case is *Harry Landau v. Comm.,* 21 T. C. ....., No. 50 (1953). The respondent has announced his acquiescence in that decision. [Int. Rev. Bull., 1954-24, p. 4.] That case involved the application of an exception to the normal Statute of Limitations under Section 3801 of the Internal Revenue Code and, more particularly, whether an item of the partner's gross income had been omitted. This depended upon whether his gross income included partnership gross or only partnership net income. The Tax Court held, contrary to the contention of the Commissioner, that a partner's gross income includes his share of partnership gross income, just as the petitioners in this case are contending. In that case, in which the decision is directly contrary to the decisions being reviewed herein, the Tax Court stated:

> "A partnership, as such, is not a taxpayer under the federal tax law; it is not a taxable entity. The general rule is that *an individual partner is deemed to own a share interest in the gross income of the partnership.*" (Emphasis added.)

The respondent has recognized this rule in other situations. For example, one of his rulings deals with the application of Section 251 of the Internal Revenue Code to partnership income. That section provides that if eighty per cent or more of the gross income of a United States citizen is derived from sources within a possession of the United States for a specified period, he will not be taxed on such income. The respondent ruled in I. T. 3981 (published at Cum. Bull., 1949-2, 78), that a partner's share of partnership *gross* income is included

in his gross income for the purpose of that section. This ruling is so clear in its statement of the principles applying to the problem with which it was concerned, as well as to the question presented herein, that we have included it in full as Appendix "B" to this Brief.

Even more recently the respondent has recognized that same rule in the application of Section 130 of the Internal Revenue Code which limits the deductions allowable for business losses which have exceeded $50,000.00 per year for five consecutive years. In Revenue Ruling 155, (published at Cum. Bull. 1953-2, 180), the respondent has stated:

> "In view of the foregoing provisions of section 130 of the Code, such section applies only to a trade or business carried on by an individual taxpayer. When an individual is a member of a partnership, the partnership business is the individual's business to the extent of his proportion of the interest in such business."

Congress has recognized the rule for which the petitioners herein contend in Section 422(a) of the Internal Revenue Code, which was added by the Revenue Act of 1950. That section defines "Unrelated Business Net Income" which is taxable to an otherwise tax-exempt organization. It provides that such an organization which carries on an unrelated business as a member of a partnership shall include, as a part of its unrelated business income, its share of the *gross* income of the partnership derived from the non-exempt activity.

Since a partner's gross income includes his share of partnership gross income under the foregoing authorities, it follows that a partner states his share of such gross

income "in the return" when he sets forth in his individual tax return his portion of partnership net taxable income and refers to the partnership information return for the detailed computation leading to that final figure. This is the method of reporting provided by the Internal Revenue Code, Section 182(c). The partnership information return is incorporated by reference into the individual returns of the partners. Accordingly, a partner states "in the return," within the meaning of Section 275(c), his share of the partnership gross income set out in the information return.

VI.

Congressional Support for Petitioners' Position.

Although we submit that the authorities cited above clearly support the petitioners herein and require the reversal of the Tax Court, one most compelling recent congressional statement should be brought to the attention of this Court.

On March 18, 1954, the House of Representatives passed a bill entitled "Revenue Code of 1954." (H. R. 8300.) On July 2, 1954, the Senate passed its version of the same bill which included some amendments to the bill originally passed by the House. Both Houses of the Congress, however, included a subsection 702(c), which subsections are substantially identical. That subsection provides:

> "(c) Gross Income of a Partner.—In any case when it is necessary to determine gross income of a partner for purposes of this chapter [Senate's version used the word 'title'], such amount shall include his distributive share of the *gross* income of the partnership." (Emphasis added.)

The Committee Reports accompanying the two versions of the bill are also substantially identical in discussing this proposed subsection. The reports state that the proposed Section 702 "represents *no change in current law and practice.*" (Emphasis added.) (House Ways & Means Committee Rept., No. 1357, 83d Cong., 2d sess., p. A221.) They also state as follows:

> "Subsection (c) relates to the determination of a partner's share of the gross income of a partnership. It will be noted that section 61(a), which defines gross income, has been amended by your committee to make clear that a partner's gross income includes his distributive share of partnership gross income. However, under subsection (c), the determination of a partner's share of the gross income of the partnership need not be made anually, but only where the determination of the partner's individual gross income is required for income tax purposes. For example, a partner is required to include his distributive share of partnership gross income in computing his individual gross income for the purpose of determining the necessity of filing a return. A partner's gross income may also be relevant for other tax purposes, such as the application of the provision permitting the spreading of income for services rendered over a 3-year period (section 1301), the amount of gross income received from possessions of the United States, and *the extended period of limitations applicable to deficiencies where there has been an omission of 25 per cent of gross income.*" (Emphasis added.) (Senate Finance Committee Rept., No. 1622, 83d Cong., 2d sess., p. 378.)

This clear statement of congressional understanding of the existing law, including the statement by both com-

mittees that it applies as the petitioners herein contend under the present Section 275(c), is a clear indication, in addition to the authorities previously cited herein, that the Tax Court was in error and that its decisions should be reversed.

VII.

Negligence.

The Tax Court sustained the five per cent "negligence penalties" in addition to the deficiencies of two of the petitioners, L. Glenn Switzer and Howard A. Switzer. Since the allegations concerning negligence were first raised by the respondent in an Amendment to his Amended Answer in the cases of these two petitioners, the burden of proof in the Tax Court with respect to these allegations was upon the respondent. (Rules of Practice, The Tax Court of the United States, Rule 32.)

The only evidence presented to the Tax Court by the respondent was:

1. A copy of each of the tax returns filed by the petitioners which provide no evidence of negligence. [R. 69-79.]

2. A stipulation of facts which shows that 1.5 per cent of the partnership gross receipts for 1944 and 3.9 per cent of the partnership gross receipts for 1945 were not included in the reported income. That stipulation also shows that deficiencies of $2,258.86 and $11,074.91 are due from L. Glenn Switzer unless their assessment is barred by the Statute of Limitations, and, similarly, that deficiencies of $809.91 and $3,768.68 are due from Howard A. Switzer unless barred by the Statute of Limitations. Certainly, these

facts do not constitute evidence of negligence. [R. 40-42.]

3. The Notices of Deficiency mailed by the respondent to the petitioners and the reports attached thereto which were offered by the respondent and received in evidence by the Tax Court for the limited purpose of showing the amounts involved and the manner in which the respondent arrived at his conclusion. They were not received as evidence of the truth of the descriptions used by the respondents concerning the income adjustments. [R. 55.] As such, the Notices of Deficiency constituted no evidence of any fact not covered by the Stipulation of Facts.

The Tax Court erroneously found that a *prima facie* case of negligence had been made by the respondent by showing the amounts omitted from income. This, in itself, does not constitute negligence. If it did, every income tax deficiency should be accompanied by a five per cent penalty for negligence.

More than mere bookkeeping errors or bookkeeping methods subject to criticism must appear to establish negligence within the meaning of Section 293(a). [*Wilson Bros. & Co. v. Comm.* (C. C. A. 9th, 1941), 124 F. 2d 606, 611.]

The respondent did not present any evidence indicating that the omission of income did not result from an error in the accounting system, a mistaken conclusion concerning legal rights or a technical question under the tax law, or

advice of counsel that the items in question were not includible.

Admittedly, the respondent need not negative every possible reason for the omission of income in making a *prima facie* case of negligence. If the burden of proof means anything, however, it must require more for its satisfaction in this context than a showing that certain items of taxable income were not included in the income reported by said petitioners.

The Tax Court also relied, in sustaining the respondent's claim of negligence, upon the "large" discrepancies between reported and corrected net income of the two individual petitioners. In considering that "fact," the Tax Court was undoubtedly persuaded toward the finding of negligence by its erroneous conclusion concerning the principal question herein involved: whether a partner's gross income includes partnership gross or partnership net income. The percentages of omitted income to reported income, mentioned by the Tax Court in its discussion of the negligence question, indicates that it was considering the percentage in view of its erroneous holding that only partnership net income is included in a partner's gross income.

We may assume that its conclusion concerning negligence would have been different had it properly considered that the omissions of income amounted to 5.32 per cent and 12.96 per cent, instead of 147.01 per cent and 444.01 per cent.

VIII.
Conclusion.

A partner's gross income within the meaning of the Internal Revenue Code and, more particularly, Section 275(c) thereof, includes his share of partnership gross income. Also within the meaning of that subsection, such gross income of the partner is "stated in the return" by him when it is reported in the manner prescribed by the Internal Revenue Code. Section 182(c) provides that, except in special situations otherwise covered, the individual partner's share of the net partnership income, set forth as the final figure on the partnership information return filed on behalf of all of the partners, is to be shown on the individual partner's return. In connection with such reporting on the individual return, the Treasury Form No. 1040 requires that the name and address of the partnership be shown, so that the partnership return can be examined and the correctness of the net income ascertained. The partner, in effect, incorporates by reference the single information return filed on behalf of all of the partners. This is similar to the individual sole proprietor who sets forth on a separate schedule "C" all of the receipts and expenses of his sole proprietorship, and shows on page 2 of his return only the net figure.

Therefore, less than 25 per cent of the income stated in the returns by these petitioners was omitted in either year. The three-year period of limitations under Section 275(a) applies and prevents the assessment of the proposed deficiencies in question. The Tax Court should be reversed with directions to enter judgment for the petitioners.

Irrespective of the conclusion of this Court upon the Statute of Limitations question, the negligence penalties sustained by the Tax Court are erroneous in that they are founded upon a finding of fact totally unsupported by the evidence.

Finally, the long standing rules to be observed in the interpretation of tax laws, as repeatedly and consistently stated by the Supreme Court, should not be overlooked:

> "In case of doubt (tax statutes) are construed most strongly against the Government, and in favor of the citizen."
>
> *Gould v. Gould,* 245 U. S. 151, 153 (1917).

> "In any event, we think this is * * * (the interpretation) which must be accepted especially in view of the rule which requires taxing acts, including provisions of limitation embodied therein, to be construed liberally in favor of the taxpayer."
>
> *United States v. Updike,* 281 U. S. 489, 496 (1929).

This rule of interpretation is particularly important in considering an exception to the Statute of Limitations that ordinarily protects a taxpayer from a claim of additional liability for years long past. It is equally important in considering the application of a *penalty* on which the Government has the burden of proof.

Respectively submitted,

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WILLIAM A. CRUIKSHANK, JR.,
ALVA C. BAIRD,
Of Counsel.

APPENDIX "A".

Statutes Involved.

Section 275(a)

"(a) GENERAL RULE.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Section 275(c)

"(c) OMISSION FROM GROSS INCOME.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed."

Section 293(a)

"(a) NEGLIGENCE.—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272(i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable."

APPENDIX "B".

Income Tax Ruling (I. T.) 3981.

Bureau of Internal Revenue

Cumulative Bulletin 1949-2, 78

"Advice is requested whether, for the purposes of section 251 of the Internal Revenue Code, relating to income derived from sources within possessions of the United States, gross income derived by a partner from a partnership consists of his proportionate share of the partnership's gross income or his distributive share of the partnership's ordinary net income.

"It is contended that Supplement F (sections 181 through 190) of Subchapter C of Chapter 1 of the Internal Revenue Code contains provisions which change the nature of the gross income derived by a partner from a partnership so that it consists (with exceptions not hereto relevant) only of his distributive share of the partnership's ordinary net income, and not of gross income such as is contemplated by section 22 of the Code.

"With the exception of section 187 of the Code, none of the sections of Supplement F contains any reference to gross income. Even in section 187, no indication is given that, as the term is there used, gross income is anything other than the items specified in section 22 of the Code.

"Section 29.189-1(a)(3) of Regulations 111 reads in part as follows:

" 'His distributive share of a business ordinary net income of the partnership shall be included by each partner as ordinary business gross income, and of a business ordi-

nary net loss of the partnership as an ordinary business deduction. His distributive share of a nonbusiness ordinary net income of the partnership shall be included by each partner as ordinary nonbusiness gross income, and of a nonbusiness ordinary net loss of the partnership as an ordinary nonbusiness deduction.'

"The sole purpose of section 29.189-1 of Regulations 111 is to interpret section 189 of the Code, a section which deals with the application of section 23(s) of the Code to partnership income. Both the purpose and the language of the regulation are such as to preclude any reasonable contention that it has the objective of prescribing that the gross income derived by a partner from a partnership should consist only of his distributive share of the partnership net income. It is apparent, therefore, that there is nothing in Supplement F which makes any exception or addition to the concept of gross income as set forth in section 22 of the Code.

"The general provisions of the income tax statute, in the absence of specific provisions to the contrary, apply to partnership income as if it were received by the partners without the intervention of the partnership. Although a partnership may generally be considered as a business unit, it is, from the viewpoint of Federal income taxation, a unit only for the purpose of making an information return on Form 1065 (United States Partnership Return of Income). Neither the partnership itself nor the partnership return can insulate the partner from his allocable portion of the partnership gross income. Form 1065 is analogous to certain of the schedules contained in Form 1040 (U. S. Individual Income Tax Return) in which the gross income derived from specified sources is entered

and the deductions directly allocable thereto are subtracted, the difference constituting an item of adjusted gross income (*cf.* section 22(n) of the Internal Revenue Code). If, for purposes of Federal income taxation, it is necessary to determine the taxpayer's gross income, the amount of gross income entered in such a schedule. not the amount of adjusted gross income, is controlling. An essential difference between the schedules in Form 1040 and the return on Form 1065 is that the schedules apply to but one return, whereas Form 1065 generally applies to two or more returns. But the individual partner's distributive share of the partnership's ordinary net income is as clearly an item of adjusted gross income as if the computation by which it was arrived at had been set forth on his individual return.

"The requirements of section 251(a) of the Code are based on amounts of gross income as well as sources of gross income. Adjusted gross income does not enter into the calculations made to determine whether the taxpayer is entitled to its benefits. A taxpayer claiming the benefits of section 251, all or a part of whose gross income during the applicable period thereunder was derived from a partnership, must determine, in addition to the sources of gross income, the amount of the gross income of that partnership which is allocable to him and make his calculations accordingly. His distributive share of the ordinary net income of the partnership does not affect this calculation."

No. 14254.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,

Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellee.

OPENING BRIEF OF APPELLANT, PACIFIC EMPLOYERS INSURANCE COMPANY.

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No. 14254.

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OPENING BRIEF OF APPELLANT, PACIFIC EMPLOYERS INSURANCE COMPANY.

Introductory Statement.

This action was brought in the United States District Court for the Southern District of California, Central Division, for declaratory relief to determine the respective liabilities of four insurance companies, under their policies of insurance, because of injuries caused to one Richard D. Carter. The two insurance companies involved in this appeal—the appellant, Pacific Employers Insurance Company, and the appellee, Hartford Accident and Indemnity Company—had insured the William P. Neil Co., Ltd., a corporation. Two other insurance companies, Anchor Casualty Company and United States

Fidelity and Guaranty Company, had insured Minnesota Mining and Manufacturing Company. Motions for summary judgment were granted by the lower court in favor of Anchor Casualty Company and United States Fidelity and Guaranty Company and they are not involved in this appeal.

For convenience, the names of the various corporations involved in this appeal will be shortened and referred to as follows:

Pacific Employers Insurance Company will be referred to as "Pacific."

Hartford Accident and Indemnity Company will be referred to as "Hartford."

William P. Neil Co., Ltd., will be referred to as "Neil Company."

Minnesota Mining & Manufacturing Company will be referred to as "Minnesota Mining Company."

The court below held Hartford and Pacific equally liable under their insurance policies for payment of the sum necessary to settle Richard D. Carter's claim for damages. From this declaratory judgment Pacific, alone, appeals.

Statement of Pleadings and Facts Showing Jurisdiction.

Plaintiff and appellee Hartford by its amended complaint for declaratory relief alleged that:

Plaintiff Hartford is a citizen of Connecticut; defendant Pacific is a citizen of California; Anchor Casualty Company and United States Fidelity and Guaranty Company (whose motions for summary judgment were granted and who are not involved in this appeal) are citizens of

the States of Minnesota and Maryland, respectively; the Neil Company is a citizen of California; the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

The evidence shows that controversy exists among the various insurance company as to their respective liabilities for payment of a claim of Richard D. Carter against Minnesota Mining Company and Neil Company (the insureds under the various policies) in the sum of $50,000, which claim was settled for the sum of $22,320.

The jurisdiction of the United States District Court is based upon Sections 1332 and 1391 of the Judicial Code, Title 28 of U. S. C. A. The jurisdiction of this court is based upon the provisions of the Judicial Code, 28 U. S. C. A., Section 1291.

Statement of Facts.

On July 10, 1947, the Neil Company and Minnesota Mining Company entered into a written contract under which the Neil Company agreed to construct a roofing granules plant for Minnesota Mining Company in Riverside County, California, on a cost plus basis. [The agreement is Pltf. Ex. 4; R. p. 191, *et seq.*] In that contract, Minnesota Mining Company is referred to as owner and Neil Company is referred to as contractor. The contract provides in part that the drawings, plans and specifications for the roofing granules plant be prepared by the contractor (Art. 1); that the owner shall have the right to amend, add to or change such drawings, plans and specifications from time to time during the progress of the work (Art. 3); the contractor agrees to provide all labor, transportation and material (Art. 4); the contractor

is to be paid on a cost plus basis, and there shall be included in cost the amount actually paid by the contractor for the rental from third persons of equipment (Art. 5(g)); that the owner reserves the right to perform such work as it may deem necessary or expedient and such amount shall not be included as a cost of the contractor (Art. 8); the contractor agrees to indemnify and hold the owner harmless because of any claim arising out of injury to any person in connection with the work (Art. 17); the contractor shall maintain public liability insurance for liability arising out of death or injury to any person in connection with the contract work (Art. 18, Sec. b); and the contractor shall maintain automobile public liability insurance on all motor vehicles engaged in operations under the contract whether on or off the site of the work to be performed thereunder (Art. 18, Sec. c).

Under date of September 30, 1947, Minnesota Mining Company entered into an "agreement for electric service involving line extensions" with California Electric Power Company for the area on which the roofing granules plant was being constructed [Deft. Ex. A; R. p. 425], as there was no electricity available on this site either for the construction or operation of the roofing granules plant [R. p. 231]. Under date of September 16, 1947, Minnesota Mining Company gave to California Electric Power Company an easement in gross for the construction, maintenance, operation, inspection, repair, replacement and removal of electric lines and cables upon, over and across the property owned by Minnesota Mining Co. upon which the roofing granules plant was being constructed [Deft. Ex. B; R. p. 429]. This easement in gross was recorded in Riverside County on September 30, 1947.

As required by Article 18, Section b, of the contract between the Neil Company and Minnesota Mining Company [R. p. 204], the Neil Company took out public liability insurance with Pacific for the period from November 1, 1947, to November 1, 1948 [Pltf. Ex. 6; R. p. 39 ff.].

As required by Article 18, Section c, of the contract between the Neil Company and Minnesota Mining Company, the Neil Company took out automobile public liability insurance with Hartford for the period October 3, 1947, to October 3, 1948 [Pltf. Ex. 5; R. p. 23 ff.].

The Pacific policy provided a limit of liability of $50,000 for each person [R. p. 40]. By coverage A, it agrees to pay on behalf of the insured, subject to the exclusions and limitations stated in the policy, all sums which the insured shall become obligated to pay by reason of liability imposed upon it by law or assumed by it under written contract for damages because of bodily injury sustained by any person.

Under Exclusions, the Pacific policy provides:

> "This policy does not apply: (a) except with respect to operations performed by independent contractors, to the ownership, maintenance, or use, including loading or unloading, of (1) automobiles while away from premises owned, rented or controlled by the insured . . ." [R. pp. 43 and 44.]

Regarding other insurance, Section 11 of the Pacific policy provides:

> "If the insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated

in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss." [R. p. 50.]

Regarding the rights of subrogation, Section 12 of the Pacific policy provides:

"In the event of any payment under this policy, the company shall be subrogated to all of the insured's rights of recovery therefor against any person or organization, and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights." [R. p. 50.]

The Hartford policy provides for a limit of liability of $50,000 for each person [R. p. 23]. By Coverage A, it agrees to pay on behalf of the insured, subject to the exclusions and limitations stated in the policy, all sums which the insured shall become obligated to pay by reason of liability imposed upon it by law for damages because of bodily injury sustained by any person and arising out of the ownership, maintenance or use of any automobile [R. p. 35].

Article III of the Hartford policy defines "insured" as follows:

"The unqualified word 'insured' includes the named insured and also includes . . . (2) under Coverages A and C, any person while using an owned automobile or a hired automobile, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured . . ."

Section 3 of the Hartford policy defines certain terms as used in the policy and subsection (b) defines "use of an automobile" as follows:

> "Use of an automobile includes the loading and unloading thereof." [R. p. 36.]

Section 3, subsection (b) of the Hartford policy defines a "hired automobile" as follows:

> " 'Hired automobile' shall mean an automobile used under contract in behalf of the named insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the name insured who is granted an operating allowance of any sort for the use of such automobile.
>
> 'Non-owned automobile' shall mean any other automobile." [R. p. 36.]

Regarding other insurance, Section 13 of the Hartford policy provides:

> "If the insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise." [R. p. 36.]

At the time of the accident to Richard D. Carter, the employees of the Neil Company and their connections with the project were:

William P. Neil, President of the Neil Company, came upon the premises and inspected the progress of the installations from once every two weeks to once a month [R. p. 403].

David H. Archibald, Vice-president of the Neil Company, was on the project every three or four days during the early part of it, and at the latter part of it, sometimes every day and other times every other day [R. p. 400]. His main work was to go over the project with A. L. Nienaber, resident engineer on the project for the Minnesota Mining Company, and discuss Mr. Nienaber's suggestions as to changes on the job.

Andrew L. Jensen was superintendent for the Neil Company on this project [R. p. 307].

W. L. Crockett was general labor foreman on the job for the Neil Company [R. p. 170]. Robert C. Grace was labor foreman under Crockett [R. p. 171]. Hubert D. Jones was in charge of the operators of the dump trucks and other equipment [R. p. 370].

The employees of the Minnesota Mining Company in charge of the project on its behalf were:

Walter E. Vroman, division engineer for Minnesota Mining Company, visited the project about every four weeks [R. p. 221].

A. L. Nienaber was the resident engineer for the Minnesota Mining Company on the project [R. p. 221]. He had a construction shack about 400 feet from the job site where he resided and made daily inspections of the

job [R. p. 235]. His work consisted of making suggestions on behalf of the Minnesota Mining Company for changes in the construction work as it was being performed by the Neil Company. These suggestions were as to the schedule of the work to be done [R. p. 398], flow of equipment onto the premises [R. p. 397], number of employees to be placed on the job [R. p. 401], speed of the work [R. p. 405], and the proper water-cement ratio in the construction [R. p. 250].

Mr. Nienaber also had an auditor who stayed on the job with him [R. p. 234].

The employees of California Electric Power Company in charge of performance of its contract with Minnesota Mining Company for electric service for the project were:

Avery W. Briggs was commercial agent for the power company in the area and, as such, conferred with Minnesota Mining Company on the selection of the site for the substation on the property of the Minnesota Mining Company [R. p. 434].

Robert A. Speer was electric substation construction superintendant for the power company [R. p. 441], and scheduled the crews of the power company to go in and put in the substation [R. p. 441].

Reginald R. Fry was in charge of the cement work in connection with constructing substations for the power company and was in charge of the crew which employed Richard D. Carter [R. p. 347].

The record is not entirely clear on when the Neil Company commenced construction under this project, but their Vice-President, David H. Archibald, estimates it was about August or September of 1947 [R. p. 388].

California Electric Power Company apparently commenced its work after recording its easement in gross and after signing its agreement for electric service on September 30, 1947. It first conferred with Nienaber, Vroman and another employee of the Minnesota Mining Company concerning the proper location of the substation on the Minnesota Mining Company property [R. pp. 432 and 433]. At that time, the work of the Neil Company was already in progress [R. p. 433]. The California Electric Power Company then submitted drawings for the substation to the Minnesota Mining Company [R. p. 435], and eventually Briggs, of the California Electric Power Company, determined that the site was sufficiently prepared so that his company could send in its crew to begin work [R. p. 437].

The California Electric Power Company did not consult with the Neil Company with respect to when it should send in its crew. This decision was made by the construction department of the California Electric Power Company [R. pp. 437 and 443].

The installation of the granules plant being a cost plus job, it was to the advantage of Minnesota Mining Company to furnish any equipment which it could on the project to the Neil Company in order to reduce the cost of the overall job [R. pp. 219 and 220]. Therefore, the Minnesota Mining Company and the Neil Company entered into an oral agreement that the Neil Company would use such equipment as the Minnesota Mining Company had available and would be fully responsible for its maintenance and proper operation [R. p. 220]. Among the various pieces of equipment which Minnesota Mining Company furnished under this agreement, were two Euclid dump trucks [R. p. 219].

One of the jobs which the Neil Company was required to do on the project, as a part of its cost plus contract, was to prepare the site for the California Electric Power Company's substation [R. p. 437]. The site of the substation was on a hill and it was necessary to cut into the hill to make a level site for the substation and then to put up a retaining wall where the hill was dug away to prevent the cut away hill from sliding down upon the substation area [R. p. 143]. After the retaining wall had been constructed, it was necessary to backfill it [R. p. 147].

The two Euclid trucks owned by Minnesota Mining Company were used by the Neil Company in making this back-fill. An employee of the Neil Company by the name of Robert A. Walker operated one of the Euclid trucks and another employee of the Neil Company by the name of Robert Foxx operated the other one.

Prior to November 18, 1947, the day on which Richard D. Carter was injured, Walker and Foxx had been back-filling behind the retaining wall for about a week [R. p. 179]. The procedure was to drive the dump trucks to an excavation a little distance away, but still on Minnesota Mining Company property, where decomposed granite was loaded into the dump trucks. Then the trucks would back up a small hill to the point where the retaining wall was being back-filled [R. p. 149]. The truck would then be parallel with the wall [R. p. 150].

Every day that there was back-filling, there was always a flag man there [R. p. 166]. The flag man on the day in question was V. O. Ford [R. p. 149]. He would stand between the dump truck and the wall on the driver's side of the truck. Mr. Ford kept a four foot lath in his

hand, and the driver of the truck, as he backed up, leaned out of the truck and noted where Mr. Ford placed the end of his lath. That indicated where he wanted the truck to dump [R. p. 151]. During the morning of November 18, the trucks were dumping three to four feet away from the wall [R. p. 151].

The back-filling did not go on continuously each day. The night of November 17, 1947, Grace was directed by Crockett or Jensen to start back-filling the next morning [R. p. 178]. On November 18, Grace directed Ford to act as flagman and Jones directed Walker and Foxx to drive the dump trucks [R. p. 180].

That same day, November 18, 1947, California Electric Power Company scheduled its concrete form crew to come in and make the forms for the foundations for the substation. Each company—the Neil Company and the California Electric Power Company—was acting independently of the other [R. pp. 437, 443, 315, 316 and 241], and California Electric Power Company was acting without direction or control by Neil Company [R. pp. 437, 443, 315, 316] or Minnesota Mining Company [R. p. 241].

During the morning of November 18, 1947, Walker and Foxx hauled possibly ten or twelve loads of decomposed granite to fill in behind the wall which formed one side of the substation [R. p. 148]. Also, during the morning of November 18, 1947, Reginald R. Fry, foreman for the California Electric Power Company and his

four employees, came upon the location for the substation for the purpose of building forms [R. p. 348]. During the morning, they worked back from the wall because of the back-filling behind the wall [R. p. 352]. In the afternoon, up until the time of the accident, Fry and Carter worked at the base of the retaining wall three or four feet from it [R. p. 356].

As to what notice the employees of California Electric Power Company gave to the employees of the Neil Company to stop back-filling and what notice the employees of the Neil Company gave to the employees of California Electric Power Company to cease working on the substation until the back-filling was completed, there is a complete diversity of testimony, as follows:

Fry (California Electric Power Company foreman) testified that no one from the Neil Company ever told them that they should not be working at the substation [R. p. 353]. He further testified that Ford, the flagman for the Neil Company, told him that the Neil Company was not going to back-fill behind the retaining wall on the afternoon of November 18 [R. p. 356].

Jensen (Neil Company superintendant) testified that the first time the California Electric Power Company crew came, he told them that they were premature and that they worked around there awhile and then left; the second time that they came around, he did not tell them to leave [R. pp. 317-319]. He further testified that the foreman from the power company came to him and told

him that the back-fill was getting pretty close to the top of the wall and Jensen stated that he would send Grace to clarify the situation [R. p. 320], but that Grace may have stopped a half dozen times before he got there [R. p. 320].

Grace (Neil Company foreman) testified that he told Fry to keep his men out of there for an hour and one-half to two hours until we got our dirt in [R. p. 182]. He did not testify that Jensen had sent him up to the back-fill to clarify the situation, but he did testify that after the accident, Jensen asked him if he hadn't received his message cutting the back-fill off and Grace replied he had not [R. p. 185].

The load of decomposed granite which caused the injury which resulted in Carter's lawsuit and this action for declaratory relief was in a Euclid truck operated by Walker. He backed the truck up to the back-fill in the usual manner, parallel to the wall, and leaning out of the truck on the wall side to see where he was backing and to see where Ford, the flagman, was indicating the truck should be stopped and dumped. This was the second load after lunch [R. p. 156]. Before the load was dumped, Walker asked Ford to look over the wall to see if any of the men were working below as he had seen some men coming out from around the wall on the last load [R. p. 155]. Walker does not know definitely whether Ford went over and looked over the wall or not, but he assumed that he did [R. p. 456]. Ford told Walker to dump the load. As he did so, he saw a few rocks go over the

side of the wall [R. p. 157]. One rock about 60 to 90 pounds in weight struck Richard Carter as he worked below [R. p. 148].

On November 16, 1948, Carter commenced action in the Superior Court of the State of California in and for the County of Riverside against Minnesota Mining Company, the Neil Company and various John Does seeking damages which he alleged resulted from the accident in the sum of $53,534.72 [R. pp. 69, 74 to 80].

On March 18, 1950, this action for declaratory relief was filed by Hartford. On January 15, and 17, 1951, Hartford and Pacific entered into an agreement which is Plaintiff's Exhibit 1 [R. p. 132 ff.], which provided in essence that Hartford is given authority to make a settlement of the case of *Richard D. Carter v. Minnesota Mining Company, Neil Company, et al.,* and the rights of the two contracting parties, Hartford and Pacific are protected as follows:

(1) Settlement and payment of the claim of Richard D. Carter shall not be with prejudice to any of the rights under the policies of Hartford and Pacific.

(2) Upon the adjudication in the declaratory relief action of the liabilities of the parties under their several policies that they will immediately pay in accordance with the adjudication any sums that they would have been required to pay had that adjudication been had before judgment in the case of *Carter v. Neil* [R. p. 135].

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(2) Upon the adjudication in the declaratory relief action of the liabilities of the parties under their several policies that they will immediately pay in accordance with the adjudication any sums that they would have been required to pay had that adjudication been had before judgment in the case of *Carter v. Neil* [R. p. 135].

(3) All of the rights of the parties under their respective policies are preserved.

On or about February 4, 1952, Hartford and Pacific together with the other two insurance companies originally involved in the action, entered into a stipulation of facts which provided in part as follows:

That on November 18, 1947, Richard D. Carter was injured while working on the premises of the Minnesota Mining Company when struck by a rock which was dumped off a truck while the same was being unloaded; that an employee of the Neil Company was driving the truck and another employee of the Neil Company was on the ground taking part in the unloading operation.

That early in 1951, the tort action of Richard D. Carter was settled for $22,320, one-half of such sum being paid by Hartford and the other half by Pacific, each reserving, by contract, all the rights against the other to abide the outcome of the declaratory relief action [R. pp. 68 to 73].

Questions Involved.

(1) Is the Hartford insurance primary insurance and the Pacific insurance secondary insurance so that Hartford is primarily liable for payment up to the amount of its policy limits?

(2) Did the Neil Company have control of the premises as required in order for the automobile provisions of the Pacific policy to be applicable?

ARGUMENT.

I.

The Hartford Insurance Is Primary Insurance and the Pacific Insurance Is Secondary Insurance.

A. The Hartford Policy Extends Its Coverage to Employees "Using" the Automobile.

The only insured under the Pacific policy is the named insured—the Neil Company. The Hartford policy, on the other hand, by Section III defines the word "insured" to include not only the named insured—the Neil Company—but also under Coverage A, "*any person* while *using* an owned automobile or a *hired* automobile, . . . provided the actual use of the automobile is with the permission of the named insured . . ." [R. p. 35].

By Section 3 of the Hartford policy, use of an automobile includes the loading and unloading thereof [R. p. 36].

B. The Negligent Dump Truck Operator and Flagman Were "Using" the Automobile.

The court below found "that it is true that the driver of the automobile truck belonging to the Mining Company, and operated by the contractor's employee, was negligent in his operation of the truck and the dumping of it, and it is further true that the flagman who was assisting in the operations of the truck telling the truckdriver where to dump and when to dump and when to stop was negligent in directing the said truckdriver, that it is true that the negligence of the said truckdriver and of the said flagman were proximate causes of the accident

and injuries to Richard D. Carter" [Finding XVIII, R. 115].

The findings of the court above quoted were not disputed by either the plaintiff or defendant as shown by the following quotation from pages 444 to 446 of the Record:

"The Court: Have you looked, Mr. Dunn, at this submitted list of issues of fact?

Mr. Dunn: I have, your Honor.

Mr. Brewer: As to number 2 we agree, your Honor, that there was negligence on the part of the flagman.

The Court: Of course, you have conceded the flagman was negligent.

Mr. Brewer: Yes.

Mr. Dunn: Yes, we have.

Mr. Brewer: We both have.

Mr. Brewer: I don't think that you could ever say that the words 'use of automobile' included a flagman in this case, that he was using the automobile.

The Court: But you can certainly say it as to the driver.

Mr. Brewer: Oh, yes, as to the driver, there is no question.

The Court: All right.

Mr. Brewer: All right, I would have to admit that, your Honor.

Mr. Dunn: If it is agreed that the activities of the admittedly negligent flagman come within the scope of the 'loading and unloading' which is within the meaning of 'use,' then we have no issue of fact, because it would be moot, one of those two persons being admittedly negligent.

Mr. Brewer: Counsel, may I ask you—I don't think that the word 'use' of automobile is defined in any way in the Hartford policy.

Mr. Dunn: I think it is.

Mr. Brewer: I don't know, I certainly have looked for it.

Mr. Dunn: That is under 'Definitions,' Subparagraph (b), unless I have the wrong one here, the paragraph numbered arabic 3, subparagraph (b), 'Automobiles. The word "automobile" shall mean a land motor vehicle'—'use of an automobile includes the loading and unloading thereof.'

The Court: Yes, it says, 'use of an automobile includes the loading and unloading thereof.' It is at the end of the first paragraph of (b). The first sentence just after it says '"owned automobile"' shall mean '—

Mr. Brewer: Oh, yes, I see. He is right, your Honor.

The Court: Well, I have your point in mind, but I am going to let you submit briefs.

Mr. Dunn: I was going to ask, your Honor, if Mr. Brewer would concede that the activities of the admittedly negligent flagman came under the heading of 'loading and unloading,' there would be no issue of fact for the court to decide with respect to the driver's negligence.

Mr. Brewer: Let me think what you are saying.

The Court: Do you concede the law he argues for, that the flagman who was assisting in the unloading of a dump truck comes within the use of the term 'unloading and loading'?

Mr. Brewer: Well, in view of that phraseology, I am afraid I would have to."

It was therefore admitted, and the court found in accordance with such admissions:

(1) that both the flagman, Ford, and the dump truck operator, Walker, were negligent and that their negligence proximately contributed to the injuries to Richard D. Carter, and

(2) that such negligence of both the flagman and the dump truck operator was in unloading an automobile.

From the above admissions and findings, it must be concluded as a matter of law, that the negligent flagman and dump truck operator were: (1) "using" an automobile within the definition of that term as set forth in Section 3 of the Hartford policy, and (2) that the flagman and the dump truck operator were both insureds within the definition of "insured" as set forth in Section III of the Hartford policy.

C. The Line of Cases Commencing With United Pacific Ins. Co. v. Ohio Casualty Ins. Co. (9 Cir.), 172 F. 2d 836, Is Controlling That the Insurance Carrier Extending Coverage to the Negligent Employee Is the Primary Insurance.

The facts of the instant case place it squarely within decisions of the Courts of Appeals for the Ninth Circuit and for the Second Circuit and the District Court for the Northern District of California, holding that the insurer that extends its insurance to cover the negligent employee is primary insurance, while the insurer which covers only the employer of the negligent employee is secondary insurance. (*United Pacific Insurance Co. v. Ohio Casualty* (9 Cir., 1949), 172 F. 2d 836; *U. S. Fidelity and Guaranty Co. v. Church* (N. D. Cal. 1952), 107 Fed. Supp. 683; *Maryland Casualty Co. v. Employers*

Mutual Liability Co. of Wisconsin (2 Cir., 1953), 208 F. 2d 731.)

United Pacific Ins. Co. v. Ohio Casualty Ins. Co. (supra) was an action for declaratory relief to declare the rights and liabilities of the two named insurance companies under their respective policies. Ohio Casualty Co. issued its comprehensive liability policy to a partnership composed of McKeon and Page, doing business as Pacific Cleaners. United Pacific Insurance Co. issued its comprehensive policy to Page individually and doing business as Mission Linen Supply Co. and by definition of "insured" extended its coverage to persons driving the automobiles with Mission's consent. Gilbert, an employee of Pacific Cleaners, was driving the truck with the permission of Page, doing business as Mission Linen Supply Co., and was involved in an accident in which one Echols was injured.

As to Gilbert, the driver whose negligence caused the accident, only one policy covered *his* liability—the policy of United Pacific Insurance Co.

At page 840, the court states:

> "The theory of Ohio is that if the negligence of Gilbert caused a loss to Pacific which in turn caused a loss to Ohio due to its liability to defend Pacific in the Echols' case, then Ohio would be entitled to a declaratory judgment establishing the primary and ultimate liability of Gilbert for Echols' claim and further authorizing Ohio to recoup its loss from Gilbert, an insured of United, and thereafter the liability would ultimately fall on United . . . and since the purpose of this action is to finally establish the respective rights of the two companies, it was proper for the court, under the facts of this case, to declare

and fix the liability of United for the tort of Gilbert in order to avoid a multiplicity of actions."

The court in footnote 5, then goes on to say:

"An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee. See *Johnson vs. City of San Fernando,* 35 C. A. (2) 244, 246, 95 P. (2) 147; *Myers vs. Tranquility Irr. Dist.,* 26 C. A. (2) 385, 389, 79 P. (2) 419."

The court in the opinion, at page 841, then goes on to state:

"Ohio contends that the recoupment rule announced in the cases cited in Footnote 5 would also apply where *a reasonable and necessary settlement is made.*" (Emphasis the court's.)

At page 845, the court states:

"We agree with Ohio that this case involves no problem of prorating insurance, but rather presents the question of who carries the insurance on the ultimately liable single tort feasor—Gilbert."

We believe that the *United Pacific v. Ohio Casualty* case lays down the following rules of law:

1. That the insurer which extends its policy to the negligent employee is primary (Op. p. 840).

2. That a judgment against the negligent employee is not a condition precedent when all of the essential facts establishing the negligence of the employee were stipulated (Op. p. 841).

3. That no issue of contribution between joint tort feasors is involved because in an action of the employer

against the employee, the negligence of the employee is not imputable to the employer (Op. p. 841).

4. That the court could declare the ultimate and therefore primary liability of the insurer with "extended insured" provisions without requiring the insurer without "extended insured" provisions to proceed to judgment against the negligent employee (Op. Br. pp. 841 and 848).

5. The "other insurance" clauses of the respective policies cancel each other out (Op. p. 845).

6. The decision is not contrary to California law as there is no "double insurance" on the employee ultimately liable (Op. p. 844).

United States Fidelity and Guaranty Co. v. Church (supra), was an action for declaratory relief to declare the liability of two insurance companies under their respective policies. Briefly, the facts showed that Thomas Rigging Co. was the owner of a truck which was being used to deliver a girder. The unloading was handled by Headrick & Brown, a co-partnership, acting by its employee, Goff. Goff negligently allowed the girder to shift, thereby injuring Church. Church brought suit in the California State Court and judgment was entered against Headrick & Brown and Goff.

U. S. Fidelity and Guaranty Co. had a liability insurance policy on Headrick & Brown. Canadian Indemnity Company had an automobile insurance policy on Thomas Rigging Co. with extended coverage insuring any person "using" such automobiles with the permission of the insured. Unloading was defined by the policy as constituting "use" of the automobile.

Analyzing these facts, the court, at pages 687 and 688, states:

> "On the basis of the foregoing, it is clear to the court that Goff was an insured under the Canadian policy . . . On the other hand, Goff is not an insured under the U. S. Fidelity and Guaranty policy to Headrick & Brown since it insured only partnership risks."

Under these facts, the court held that Canadian Indemnity Company was ultimately liable and was therefore the primary insurance, and at page 688, states:

> "The theory behind this decision is that Headrick & Brown had a clear right of action to recover from Goff the sums necessarily expended in payment for his torts, 'and in an action for that purpose, no issue of contributions between tort feasors would be involved—this because in such an action the negligence of the employee is not imputable to the employer (in California). An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee.' *United Pacific Ins. Co. v. Ohio Casualty Ins. Co.,* 172 Fed. (2d) 841, citing *Johnston v. City of San Fernando,* 35 C. A. (2) 244; see also, *Popejoy v. Hannon,* 37 Cal. (2) 484, 231 Pac. (2) 484; *Spruce v. Wellman,* 98 C. A. (2) 158, 219 Pac. (2d) 472 . . . Under the rule of the United Pacific case, there is no problem of contribution where the person *ultimately liable* is insured under but *one* policy, and so the 'other insurance' clauses are completely irrelevant to this decision." (Emphasis added.)

Again at page 688, the court states:

> "Canadian and U. S. Fidelity and Guaranty are jointly obligated to satisfy any judgment rendered against Headrick & Brown . . . *Headrick & Brown is thus in the position of being doubly insured, Consolidated Shippers vs. Pacific Employers,* 45 C. A. (2) 288, 114 Pac. 2d 34, and . . . *if Goff were uninsured,* Canadian would have no answer for the excess, if any, within the limits of its policy, however, as Goff—the ultimately liable tort feasor—*is* insured by Canadian, *and Canadian alone,* that company is obligated to respond to and satisfy any judgment rendered against Goff and is also obligated to reimburse U. S. Fidelity and Guaranty for all expenditures reasonably and necessarily made to or on behalf of Church in satisfaction of the judgment recovered by Church." (Emphasis added.)

The most recent case on the point is *Maryland Casualty Company v. Employers Mutual of Wisconsin (supra),* in which the opinion of the court is given by Judge Learned Hand, reversing the decision of the lower court.

The opinion of the lower court (112 Fed. Supp. 272) sets forth the facts as follows: Maryland Casualty Co. issued an auto policy covering the Smedley Co. of Hartford and any driver operating its motor trucks with the consent of the Smedley Co. Employers Mutuals issued a comprehensive general liability policy covering the Smedley Co., but excluding insured's liability with respect to automobiles away from the premises owned or rented or controlled by the named insured, or the ways immediately adjoining. The accident took place in the driveway leading out of the Smedley Co.'s premises. Under these facts, the Employers Mutuals refused to defend contending (1) that the accident did not occur on the ways immediately

adjoining the premises of the insured, and (2) that its liability was secondary and that of the Maryland Casualty primary. The lower court held against the Employers Mutuals on both points.

The Court of Appeals in reversing the District Court, stated, at page 732:

> "We shall try to show that to allow the plaintiff to recover any part of the payment, made in settlement of this action, would result in a circuity of action. It is indeed true that, having paid the loss, it becomes subrogated to the Smedley Company's right under the defendant's policy; but, if the defendant had paid to the plaintiff one-third of the loss, it too would in turn have been subrogated to any rights of the Smedley Company by virtue of the subrogation clause in its own policy. One of the rights of the Smedley Company would have been to throw the loss on Amendola for in Connecticut, as elsewhere, an employer who has been forced to pay a loss because of his imputed liability for the negligence of his servant, may recover from the servant upon the servant's default in his duty to conduct the work with reasonable care. The doctrine that there is no contribution or indemnity between joint tort feasors does not apply when the liability of one of them is not for a personal fault, but because the personal fault of the other is imputed to him. Therefore, after paying the plaintiff a third of the settlement, the defendant, as surrogate of the Smedley Company could have obtained a judgment for the same amount against Amendola, the driver; and if Amendola had paid this claim, he could have recovered it from the plaintiff under his policy of insurance. That would have been a complete circuity of action."

The court, at page 733, then goes on to point out that the negligent employee would not have to pay the loss since the Maryland Casualty policy by its terms agreed "to pay on behalf of the insured all sums which the insured shall become *legally obligated to pay* as damages . . . sustained by any person . . . arising out of the . . . use of any automobile." (Emphasis added.)

Similarly, in the instant case, the Hartford policy agrees "to pay on behalf of the insured all sums which the insured shall *become obligated to pay* by reason of the liability imposed upon him by law for damages . . . and arising out of the . . . use of any automobile" [R. p. 35, Coverage A of Policy].

In California where the indemnitor engages to save indemnitee from liability, liability is established upon the rendition of a judgment against the indemnitee with respect to the thing indemnified although the judgment remains unpaid. (*Alberts v. American Casualty Co.*, 88 Cal. App. 2d 891, 200 P. 2d 37; *Tunstead v. Nixdorf,* 80 Cal. 647 at 651, 22 Pac. 472.)

Furthermore, in California the law is the same as the provision of the Connecticut law quoted by Judge Hand: Under California Statutes of 1919, page 677, an injured person who obtains a judgment against an insured automobile owner which is unsatisfied may bring an action against the insurer for the amount of said judgment. (*Langley v. Zurich General Accident and Liability Insurance Co.,* 97 Cal. App. 434.)

Judge Hand concludes at page 733:

> "Thus, since the Smedley Company could have collected from the plaintiff directly any payment it made of a judgment against it in favor of Dachene's Ad-

> ministrator, this defendant could have done the same; and so, on any view, it would result in a circuity of action to allow the plaintiff to recover in the action at bar."

Similarly, in the instant case, the Neil Co. could have collected from Hartford for any judgment rendered against it because of the negligence of its employees and Pacific could have done the same.

The above cases would apparently control and dispose of the instant case. The court below, however, in its Memorandum of Opinion and in its Conclusions, sought to distinguish the instant case from the line of authority above cited. We will, therefore, take up each of the points on which the court below endeavored to distinguish the instant case from the above authorities and will seek to show that the points on which the instant case was distinguished are not legally sustainable.

D. The Finding That Supervisory Employees of Neil Co. Were Negligent Does Not Distinguish the Instant Case From United Pacific Ins. Co. v. Ohio Casualty Ins. Co.

The court below decided that the case of *United Pacific Insurance Company v. Ohio Casualty Company, supra,* was not controlling in the instant case because of its finding that supervisory employees of the Neil Company, as well as the non-supervisory employees, were negligent and such negligence was a proximate cause of the injuries to Richard D. Carter. This position of the court below is set forth in its Memorandum of Opinion, Section 5 [R. p. 104], as follows:

> "The court finds that negligence of the Neil Company was a proximate cause of injury to Carter, *i.e.,*

acts and omissions of its supervisors or employees under its supervisorial charge other than the truck driver:

(1) In the management of loading and dumping operations;

(2) But, not as to the safety of the place furnished for Carter in which to work."

In its findings, the court below found that the supervisorial employees were negligent in the management of loading and dumping operations which contributed proximately to the accident and injuries of Richard D. Carter, and this "would bar any action of the defendant against the said truck driver and the said flagman . . . for the reason that the defendant could not subrogate against said employees of the Neil Company by virtue of any subrogation rights under their policy for the reason that said Neil Co. in whose name and by whose assignment they were suing was thereby guilty of negligence proximately causing the accident, other than the acts of the truckdriver and the flagman of the truck and they would be in *pari delicto* and would be subject to the defense of contributory negligence" and would be in effect asking for a total contribution from one joint tort feasor to another [Finding XXV, R. p. 120]. The supervisorial employees which the court below found to be negligent were Robert C. Grace, Labor Foreman over the flagman, Hubert D. Jones, in charge of the truck drivers, and Andrew Jensen, General Superintendent of the Neil Company [Finding XXIII, R. p. 118].

It is the position of the appellant on this point: (1) that there was no negligence on the part of the supervisorial employees of the Neil Company, and (2) that if

there were negligence on the part of the supervisorial employees of the Neil Company, such negligence was not the negligence of the corporation itself, nor was it a corporate act, and the liability of the Neil Company, because of the negligence of its employees, both supervisorial and non-supervisorial, would exist only under the doctrine of *respondeat superior*.

First, we will address ourselves to the question of whether any of the supervisory employees were negligent in connection with the back-filling of the substation site retaining wall. A flagman was assigned for every load that was dumped [R. p. 166]. The flagman stood between the wall and the place where the decomposed granite was dumped as back-fill; thus, he could indicate a dumping point a safe distance from the retaining wall and he could easily ascertain whether any one was working below before directing that the truck be dumped [R. p. 151]. It must be remembered that the Neil Company had no control over the California Electric Power Company crew as to *when* it would come upon the substation site or *where* it would work upon the site. Under its cost plus contract, the Neil Co. was in a position where it had to complete such work as it was required to perform on the substation site without any control over the scheduling of the California Electric Power Co. crews on the same site [R. pp. 437, 443, 315, 316 and 241]. Under these circumstances, it is submitted that the supervisory employees did everything that they were reasonably required to do when they placed a flagman at the site to make certain that the trucks would be dumped at a point and a time that would not endanger others.

Addressing ourselves to the second point, it is the position of appellant that if there was any negligence on the part of the supervisorial employees of the Neil Company, this was in acts of omission and not acts of commission.

If there was any negligence on the part of the superintendent Jensen, it was in his failure or *omission* to make certain that the man whom he sent to the site "to clarify the situation" went up there immediately and didn't stop en route [R. p. 320].

If there was any negligence on the part of the foreman Grace, it was in his failure or *omission* to check on the dumping crew often enough [R. p. 180].

The record does not disclose any activity of Jones which could be labeled as negligence in connection with this dumping operation.

It is submitted that if, in fact, there was any negligence on the part of the supervisory employees of the Neil Company, it was in individual acts of omission; such individual acts of omission did not constitute the performance of corporate policy; they were not by any stretch of the imagination the *performance of delegated corporate authority.* Under such circumstances, it is submitted that the corporation is liable for these individual acts of negligent omission only under the same doctrine as its liability for the negligent acts of the flagman and dump truck operator—under the doctrine of *respondeat superior.*

The leading California case on this point is *Bradley v. Rosenthal,* 154 Cal. 420. This case involved the liability of a corporation, Sunset Telephone & Telegraph Company, because of the acts of negligence of an agent in charge of construction—one Rosenthal. Rosenthal was in charge

of constructing telephone pole lines to outlying districts, and one of his duties consisted of selecting the poles. One of the poles collapsed under Bradley, a rigger, injuring him. Bradley brought an action against Rosenthal and Sunset Telephone & Telegraph Company jointly, alleging negligence in the selection of brittle poles for rigging. The jury in the action brought in a verdict exonerating Rosenthal and judgment was entered against the telephone company for the full amount of damages prayed for. The Supreme Court reversing the decision, at page 423, stated:

> "Appellant (the corporation) argues that the evidence establishes without conflict that if it be responsible at all, it is responsible solely because of the relationship of principal and agent found to exist between itself and the co-defendant, Rosenthal; that not one word of evidence tends to establish any direct personal participation, personal knowledge or personal culpability upon its part, or that its employee, Rosenthal, was in any way carrying out its express instructions in the particular matter for the doing of which negligence is charged; that under such circumstances, the employer is liable only because of the rule of law which holds him responsible, as well for the undirected as the directed act of the agent within the scope of his employment; that in such kind of cases where there have been *no express instructions for the doing of the act complained of in the particular way, the principal and agent, master and servant, are not joint tort feasors as the law employs that term.*
>
> The employee's responsibility is *primary*. He is responsible because he has committed the wrongful or negligent act. The employer's responsibility is

> *secondary,* in the sense that he has committed no moral wrong, but under the law is held accountable for his agent's conduct. While both may be sued in a single action, a verdict exonerating the agent must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has done no wrong, and the principal cannot be responsible if the agent has committed no tort. While no right of contribution exists between tort feasors, whether sued separately or collectively, there exists in the kind of case here presented much more than the mere right of contribution. *The principal who has been obligated thus to pay for unauthorized negligent act of his agent resulting in injury may indemnify himself to the full amount against his agent."* (Emphasis added.)

In other words, before the corporation itself is responsible for the tort of the employee, other than under the doctrine of *respondeat superior,* it must be a *directed* act; that is, there must be instructions for the doing of the act complained of in *the particular way.*

Applying this law to the instant case, the negligent acts which the court below found proximately caused the injury were (a) the negligence of the dump truck operator and the flagman in not ascertaining whether there were persons immediately below them when the load was dumped, and in dumping it in such a place and manner as permitted a part of it to go over the retaining wall, and (b) the negligence of the supervisory employees in failing properly to supervise the dumping. These acts were not done under "express instructions" to do the acts in this "particlar way," and consequently are not the acts of the Neil Company.

An example of the difference between a directed act of an employee and an undirected act of an employee within the scope of his employment is as follows: Suppose the employer tells a truck driver employee to drive a truck load of merchandise from Los Angeles to San Bernardino and on the way the employee causes an accident because of his excessive speed. The proximate cause of the accident is the excessive speed and this is not a directed act of the employer. Under such circumstances, the employer is liable only under the doctrine of *respondeat superior*. Suppose, on the other hand, that the employer tells the same employee to drive a truck load of merchandise from Los Angeles to San Bernardino and to make the trip within a length of time which requires excessive speed. If an accident then occurs because of the excessive speed, the employee is performing an act in a particular way directed and the employer is liable as a joint tort feasor.

In the instant case, the flagman and the dump truck operator were directed to dump the decomposed granite to back-fill the retaining wall, but the directed act was not the proximate cause of the injury. The proximate cause of the injury was the doing of this act in the scope of their employment in an undirected negligent manner. So far as the supervisory employees were concerned, they were performing corporate policy when on November 17th and 18th, they scheduled the back-fill operation, but this was not a proximate cause of the injury. The proximate cause of the injury according to finding of the court below [R. p. 118], was the failure to properly manage the back-filling operation. As to the Neil corporation itself, this, at most, constituted negligence of its employees the

same as the negligence of the dump truck operator and the flagman.

In the case of *Rannard v. Lockheed Aircraft Corp.,* 26 Cal. 2d 149, suit was brought against Lockheed Aircraft Corp. for malpractice of a doctor employed by it. At page 159, the court states:

> "The doctor was the servant of defendant. The case is the same, therefore, as if the defendant's manager or other agent or employee had inflicted the injuries and the rule of *respondeat superior* applies."

It will be noted that the California cases do not hold the corporation itself liable, other than under the doctrine of *respondeat superior,* because the negligent employee was a manager or in charge of the entire construction project as was Rosenthal in *Bradley v. Rosenthal, supra.* The question is not what is the position of the employee committing the tort, but whether in committing the tort he was carrying out corporate policy.

The California law on the point of the liability of the corporation for acts of its agents and employees can be summed up as follows:

1. When the tort is performed in accordance with the express order of corporate officers or agents carrying out corporate policy, the corporation is a joint tort feasor. Thus, in the case of *McInerney v. The United Railroads,* 50 Cal. App. 538, 195 Pac. 958, where the railroad, acting under instructions from its President, employed guards to break up a strike and directed them to use such force as was necessary, and they assaulted a man not connected with the strike who suffered injuries, it was held that

the employees were acting under orders broad enough to contemplate the use of force upon the strikers or sympathizers and the railroad was liable not under the doctrine of *respondeat superior,* but as a joint participant in the wrongful acts. A similar case is *Benson v. Southern Pacific,* 177 Cal. 777, where the act of the employee in running a railroad train at a negligent rate of speed was done under the rules of the railroad requiring such speed.

2. When the tort by the employee is expressly ratified by the corporation, the corporation is jointly liable. *Jameson v. Gavett,* 22 Cal. App. 2d 646, 71 P. 2d 937; *Davison v. Diamond Match Co.,* 10 Cal. App. 2d 218 at p. 222, 51 P. 2d 452.

3. When the tort is the undirected act of the employee, who is nevertheless acting within the scope of his employment, the corporation is liable solely under the doctrine of *respondeat superior. Bradley v. Rosenthal,* 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171; *Tolley v. Engert,* 71 Cal. App. 439, 235 Pac. 651; *Plott v. York,* 33 Cal. App. 2d 460, 91 P. 2d 924; *Freeman v. Churchill,* 30 Cal. 2d 453, 183 P. 2d 4.

An interesting federal case involving whether an act of the President of a corporation was, under the circumstances which existed, a corporate act is *Glens Falls Indemnity Company v. Atlantic Building Corporation,* 199 F. 2d 60. In that case the President of the building corporation committed a battery while driving a company truck to deliver a motor. The insurance company refused to defend on the grounds that the policy did not insure against the wilful acts of the corporation itself.

The court held that the battery was not committed "by or at the direction of the insured." On the question of whether the act of the President was the act of the corporation, the court, at page 62, states:

> "The problem of coverage in each instance must therefore be resolved by ascertaining the extent of the agent's authority and capacity in which he has acted, and *whether his action may be deemed to have been performed with the corporation's knowledge and consent.*" (Emphasis added.)

Section 800 of the California Corporations Code provides that all corporate powers shall be vested in the Board of Directors. All corporate powers must be exercised by the Board or those agents to whom the corporate power has been duly delegated. (Ballantine, "Law of Corporation," 1949 Ed., Sec. 56, p. 77.) In order for an officer or agent to be performing a corporate act, he must be performing acts specifically delegated to him by the Board. It is therefore obvious that while an officer or agent performing an intentional tort may be carrying out corporate policy and performing a corporate act, an officer or agent who is performing a negligent act would under only the most exceptional cases be carrying out delegated corporate authority and performing a corporate act.

So, in the instant case, the action of the supervisory employees in scheduling the back-filling was performed with the corporation's knowledge and consent, and in performance of corporate policy. If the court below had found that the act of scheduling back-filling was a tortious act, then it could logically be concluded that the tort was that of the corporation itself. But, the back-filling was

not a tortious act; the tortious acts of the supervisory employees, as found by the court below, consisted of certain acts of omission—in the *failure* to properly manage the back-filling. The *failure* to properly manage the back-filling was not done with the corporation's knowledge or consent, and was not in furtherance of corporate policy.

It will be noted that the court below specifically found that the Neil Company was not negligent as to the safety of the place furnished for Richard D. Carter in which to work [R. p. 115, last sentence of Finding XVIII].

In other words, the *place* was not inherently dangerous nor did the Neil Company direct any act that would make the *place* a dangerous place for Richard D. Carter to work; the negligence as found by the court below was that of employees in failing to use due care in performing their duties.

In essence, the court's findings that the non-supervisory employees, Walker and Ford, were negligent and that the supervisory employees, Jensen, Grace and Jones, were negligent and that the negligence of all five contributed proximately to the injuries to Richard D. Carter, show only as a matter of law that these five employees were joint tort feasors, and that the Neil Company was liable under the doctrine of *respondeat superior*. None of the acts of negligence found by the court below were acts directed to be done by the corporation. In commiting the acts of negligence, which the court below found proximately caused the injury, none of the employees were carrying out corporate policy. Under such facts and findings, the Neil Company would have a right to recoup its loss against the employee joint tort feasors for any sums which it was required to pay out by virtue of the

injuries to Richard D. Carter. *Bradley v. Rosenthal*, 154 Cal. 420; *Myers v. Tranquillity Irr. Dist.*, 26 Cal. App. 2d 385, at page 389. Rest. of Agency, Sec. 401, p. 914; Rest. of Restitution, Sec. 96, p. 418. There would be no right of contribution as among the five joint tort feasors or by Hartford as the indemnitor of two of them. *Smith v. Fall River Jt. Union Highschool Dist.*, 1 Cal. 2d 331. Pacific, under Section 12 of its policy [R. p. 50], would be subrogated to these rights of the Neil Company. Therefore, in the final analysis, the insurance company which insured the flagmen and the dump truck operator would be responsible for payment, and this irrespective of whether or not there were other employees besides those two who were in the position of joint tort feasors.

E. The Statute of Limitations Had Not Run Against the Right of the Neil Company to Recoup Against Its Negligent Employees.

In endeavoring to distinguish the instant case from the line of cases headed by *Ohio Casualty Company v. The United Pacific Company, supra,* the court found that the right of action of the Neil Company against the negligent employees (and consequently, the subrogation rights of Pacific) accrued on January 27, 1951, when Pacific paid money on a settlement with Richard D. Carter and would have been barred by the Statute of Limitations as contained in Section 340, Subdivision 3 of the Code of Civil Procedure of California, on January 27, 1952, which was before the trial and submission of this action [Finding XXIII, R. p. 119]. From this, the court concluded that the Neil Company has no right of action against the flagman and dump truck operator [Conclusion 5, R.

p. 124] and even though Hartford was the insurer of the flagman and dump truck operator, it was not the primary insurance because the right of action against these employees had ceased to exist.

It is the position of the appellant on this point that the right of the Neil Company to recoup from its negligent employees had not outlawed; that by stipulation of the parties, the court below was required to determine the rights and obligations of the parties as of the date of such stipulation with the very purpose in view that it would not then be necessary to file any additional suits, but that the parties, without further suits, would pay in accordance with the determination of the court declaring the ultimate respective liabilities of the two insurers.

The right of the employer to recoup or indemnify himself for sums paid out because of the undirected tortious acts of the employee is based upon an implied contract of indemnity. See Restatement of Restitution, Sec. 96, pp. 418-419; *Bradley v. Rosenthal* (*supra*) at page 423, where the court quotes from Cooley on Torts as follows:

> "as between the company and its servants, the latter alone is the wrong-doer and in calling upon him for *indemnity,* the company bases no claim upon its own misfeasance or default, but upon that of the servant himself." (Emphasis added.)

By Section 2772 of the Civil Code of California:

> "Indemnity is a *contract* by which one engages to save another from a legal consequence of the conduct of one of the parties, or some other person." (Emphasis added.)

The contract between the employer and negligent employee for indemnity is implied (2779 Civil Code of California; 13 Cal. Jur. Supp. 981, Note 10). See also, *Dunn v. Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 67 N. E. 439. An action upon an implied in law contract is controlled by C. C. P. 339 (1) which prescribes a two-year period, in which the action should be brought. *Crystal v. Hutton,* 1 Cal. App. 251, 81 Pac. 1115; *Bray v. Cohn,* 7 Cal. App. 124, 93 Pac. 893.

From the above cases, it is apparent that the Statute of Limitations on an action by the Neil Company against its negligent employees would have commenced to run on January 27, 1951, the date on which payment to Richard D. Carter was actually made, as set forth in Finding XXIII of the court below, and the Statute of Limitations would not bar such action until January 27, 1953, instead of January 27, 1952, as found by the court in its Finding XXIII. Since this case was tried in the court below on March 12 and March 13 of 1952 [see Record], it is apparent that at the date of trial, the right of action of the Neil Company against its negligent employees was not barred by the Statute of Limitations. The court's findings cannot be based upon facts as they existed subsequent to the taking of evidence as such facts are not before the court.

Declaratory actions have preponderantly equitable affiliations Borchard, Declaratory Judgments, Second Addition, p. 348.) In equity, the rights of the parties are determined as they stood at the commencement of the

suit. (*American Securities Co. v. Van Loben Sels,* 13 Cal. App. 2d 265 at p. 272, 56 P. 2d 1247, 1251.) If there has been a change in the rights of the parties subsequent to the commencement of the suit, equity may determine the rights as of such subsequent time if the changed conditions are judicially before the court by the pleadings and evidence (30 C. J. S. 990). No facts were judicially before the court subsequent to the final taking of evidence March 13, 1952. The judgment was based upon such evidence and nothing subsequent thereto. On March 13, 1952, the rights of the Neil Company against its negligent employees for indemnification had not outlawed.

We also wish to point out that the Statute of Limitations is a personal defense that must be pleaded. The court below cannot presume that the statute would be pleaded by the negligent employees. (*People v. Perris Irrigation Dist.,* 142 Cal. 601, at p. 607.)

At the time of the payment to Richard D. Carter, an agreement was entered into between Hartford and Pacific, and at the time of the trial, this agreement was received in evidence as Plaintiff's Exhibit 1 [R. pp. 132 to 136]. After giving Hartford authority to negotiate a settlement of the *Carter* case, the agreement goes on to state:

> "7. That it is the desire of the parties to this agreement that such negotiations, or payment thereunder in case of settlement, shall be protected from any claim of waiver of the provisions of the policies of the parties. . . .

"It is hereby agreed by the parties that settlement and payment of the said claim of Richard D. Carter against Neil shall not be with any prejudice to any of the rights under the policies of the Hartford and the Pacific.

"It is further agreed that on adjudication in the declaratory relief action of the liabilities of the parties under their several policies or settlement of said declaratory relief action by the parties before then, that they will immediately pay in accordance with the adjudication when the judgment is final or upon such settlement of the declaratory relief action, *any sums that they would have been required to pay had that adjudication or such settlement been had before settlement or a judgment in the case of Carter v. Neil and the mining company.*" (Emphasis added.)

"It is understood that this agreement is intended to preserve all of the rights of each party hereto under their respective policies and under the facts of the case, and is intended to prevent any claim of waiver."

In other words, the parties, by express agreement, stated that they would pay such sums as they would have been required to pay had the declaratory relief judgment been *before* settlement of the case of *Carter v. Neil.* Under such a stipulation, the Statute of Limitations cannot be presumed to have run. The very purpose of the stipulation was to prevent a claim of waiver of rights by the passage of time.

II.

The Neil Company Did Not Have Control of the Premises Within the Meaning of That Portion of the Pacific Policy Providing That It Is Not Applicable to Automobile Accidents While Away From the Premises Controlled by the Insured.

The exclusions in the Pacific policy provided as follows:

> "This policy does not apply:
>
> (a) Except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading and unloading, of (1) automobiles while away from the premises owned, rented or controlled by the Insured or the ways immediately adjoining" [R. pp. 44 and 45].

The Pacific policy was not a comprehensive policy so far as automobile accidents were concerned, but was subject to this broad exclusion.

At the time of the accident to Richard D. Carter, the flagman, Ford, and the dump truck operator, Walker, were engaged in unloading the truck in connection with completing the substation site selected for the California Electric Power Company substation. Under its cost plus contract, the work which the Neil Company was required to do in connection with the substation site was to level out the site, put up a retaining wall on the hill side and back-fill behind the retaining wall. This last portion of its duties was being completed on Nov. 18, 1947.

The question then is whether the substation site, where the Neil Company was completing its work by unloading its truck to back-fill the retaining wall constituted prem-

ises "owned, rented or controlled" by the Neil Company. The premises were not owned or rented by the Neil Company so the question narrows itself to: Were these premises "controlled" by the Neil Company?

The premises had been selected by Minnesota Mining Company and California Electric Power Company officials as the site for the California Electric Power Company substation [R. p. 434].

The Minnesota Mining Company had given the California Electric Power Company an easement in gross which permitted them to go upon the premises for construction work in connection with such easement without restriction [R. p. 439], and the court below found that the California Electric Power Company crew was on the premises on November 18, 1947, in the exercise of such easement in gross [Finding III, R. p. 108].

The California Electric Power Company was not a subcontractor of the Neil Company and the Neil Company had no control over when the California Electric Power Company scheduled its crews to come on the premises [R. pp. 437, 443, 315, 316, 241].

The Neil Company put up barricades across the road to keep persons out of the general area owned by the Minnesota Mining Company on which the granules plant was being constructed, but the California Electric Power Company officials and crew went past these barriers at will when its employees or crews were scheduled to go on the premises [R. pp. 437-438 and 441-442].

The California Electric Power Company prepared its own plans for the power station site, including details of the retaining wall [R. p. 435], and when the blue prints of the substation site which the Neil Company

had did not conform to the blue prints for the site that the California Electric Power Company had, the Neil Company changed its blue prints to conform to that of California Electric Power Company [R. p. 351].

On November 18, 1947, the California Electric Power Company crew was on the premises in question, under its own easement, under a schedule it alone had set up, and following blue prints for the substation which it had prepared.

It must be remembered that the Neil Company was building several structures on a large acreage owned by the Minnesota Mining Company [R. p. 231]. In this action, however, only one part of the project is involved—the substation site on which the dump truck was working—and the question is whether the Neil Company controlled those premises.

A general contractor can usually exercise control over a building site where all other contractors are sub-contractors under it. In such instances, it has the right and exercises the authority to schedule the crews in such a manner that the work of one does not interfere with the work of the other, or that the work of one does not endanger the employees of another crew. Such right did not exist in this case.

The fact of the matter is that had the Neil Company had control of the premises, the accident would never have happened. Had the Neil Company had control of the premises, Jensen would have kept the California Electric Power Company crew off the substation site until the back-filling was completed and the site entirely ready. He endeavored to do this once, but the crew stayed on for the rest of the day anyway [R. p. 321].

The second time the California Electric Power Company crew came on, Jensen did not try to tell them to keep off the substation site [R. p. 319].

We can at once see the hazards inherent in this situation. It is Pacific's position that it is precisely such hazards as this that its policy did not intend to insure against so far as automobile insurance is concerned.

From an actuarial viewpoint, it is apparent that the risk of accident and injury is lessened when the insured has control of the premises and the premium is computed and collected on the basis of this lessened risk. Where on the other hand, another has uncontrolled access to and dominion upon the premises for the purpose of doing such work at such time and in such manner as the other person desires, the risk is greatly increased.

The Pacific policy is a comprehensive liability policy as to accidents *other than those resulting from the use of automobiles.* As to accidents arising from the use of automobiles the Pacific policy is a *limited* policy intentionally restricted by the exclusion set forth in Subsection (a).

It must be borne in mind that Pacific's policy was not intended to afford coverage for auto accidents. The Neil Company purchased another policy to cover auto accidents—the Hartford policy—which afforded coverage for auto accidents without exclusion as to the location of the accident, and extended its coverage to employees of the Neil Company engaged in unloading automobiles. The Pacific policy was designed to extend coverage for automobile accidents to a limited situation, namely, an accident occurring on premises which the Neil Company owned, rented or controlled.

The word control must be used in its commonly accepted meaning. The case of *J. S. Spiers & Co. v. Underwriters at Lloyd's,* 84 Cal. App. 2d 603, involved the meaning of the word control in an insurance policy. At page 604, the court states:

> "In Black's Law Dictionary, 'control' is defined as follows: 'power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer or oversee'. In *Rose v. Union Gas & Oil Co.,* 297 Fed. 16, it is defined as follows: 'the word "control" does not import an absolute or even qualified ownership. On the contrary, it is synonymous with superintend, management or authority to direct, restrict, regulate'. (See also, *Dinan v. Superior Court,* 6 C. A. 217, 91 Pac. 806; *McCarthy v. Board of Supervisors,* 15 C. A. 576, 115 Pac. 458; *Coffey v. Superior Court,* 147 Cal. 525, 82 Pac. 75.)"

In the *Speirs* case, the right of "control" of any automobile exempted the occurrence from the provisions of the Board. The court went on to hold that the plaintiff had "control" since it had "complete possession and power and authority to manage the truck."

Regarding the effect of such exclusion, the court, at page 605, goes on to state:

> "As said in Couch's Cyclopedia of Insurance, Volume 2, Section 187: '. . . an insurer ordinarily may insert as many exclusion clauses in its policy as it sees fit, and the courts cannot change terms by judicial construction even in the case of exemptions from liability, if the same are free from ambiguity and uncertainty as to meaning.' "

Watson v. Fireman's Ins. Co., 83 N. H. 200, 140 Atl. 169, involved the meaning of the words "premises over

which the insured has no control" as contained in a fire insurance policy. The question was whether the insured had control of that portion of a barn where the insured's son took his car to put in gasoline. At page 172, the court states:

> "Control of the premises necessarily includes power to determine what acts shall be done upon them. For the time being, such power was lacking. If it be said that the occasion is too transitory, the inquiry at once arises, what period of time would be sufficient? *If the owner has no power to prevent the act, why should he be thought to have control over that portion of the premises when the unpreventable act is done . . .* ? If a permission to occupy an undefined spot on the barn floor, in its owner's absence, does not surrender control of the particular place where the invitee puts his car, how definitely must the space be delimited in the permission?" (Emphasis added.)

A. T. Morris & Co. v. Mutual Casualty, 289 N. Y. Supp. 227, 163 Misc. 715, involved the meaning of the words property "other than in the . . . control of the assured" within the meaning of a public liability policy. The insured was a subcontractor engaged in putting in the air conditioning in the Tivoli Theater in Brooklyn and during the course of the work damaged the ceiling of the theater. The policy applied only to accidents other than on property controlled by the assured. The court held that the insured did not have control and at page 231, states:

> "Possession or control of real property is indicated by an occupation exclusive of the control of anyone else."

Numerous other cases have held that the word "control" implies "authoritative control" or "dominion" or "exclusive control."

In *Cohen v. Keystone Mutual Casualty Co.,* 30 A. 2d 203 (151 Pa. Super. 211), at page 205, the court states:

> "The plaintiff and its employees were simply in the property temporarily for the purpose of doing the work. The control of the property still remained in the owners or lessees thereof."

In *Cohen & Powell v. Great American Indemnity Co.,* 16 A. 2d 354 (127 Conn. 257) at page 355, the court states:

> "A thing is not 'in charge of' an insured within the meaning of the policy unless he has the right to exercise dominion or control over it."

In this respect, see also:

Clark Motor Co. v. United Pacific, 139 P. 2d 570 (Or.);

Speir v. Ayling Pennsylvania, 45 A. 2d 385, 158 Pa. Super. 404;

State Auto Mutual v. Connable-Joest, Inc., 125 S. W. 2d 490 (Tenn);

Aetna Casualty Co. v. Patton, 57 S. W. 2d 32 (Ky.).

In determining the meaning of the exclusion from the Pacific policy: "This policy does not apply . . . to the . . . use, including loading or unloading, of automobiles while away from the premises owned, rented or con-

trolled by the insured . . ." we believe the court should take the following law and facts into consideration:

(1) A strict construction of the word "control" would result in double coverage of the Neil Company—a situation that certainly was not intended by any of the parties. Where a contract is susceptible of two interpretations, one of which is reasonable and fair, and the other which is unreasonable, the latter interpretation must be disregarded and the first accepted. *Cohn v. Cohn,* 20 Cal. 2d 65, 70; *Stein v. Archibald,* 151 Cal. 220, 223; *Coletti v. State,* 45 Cal. App. 2d 302, 305; *Yeremian v. Turlock, etc. Co., Inc.,* 30 Cal. App. 2d 96; California Civil Code Sec. 1643; Restatement, Law of Contracts, Sec. 263(a).

(2) Strict construction cannot be used to nullify the express agreement of the parties, and certainly it should not be so indulged on behalf of a stranger to the policy, namely, the Hartford Co. *Brichell v. Atlas Assur. Co.,* 10 Cal. App. 17, 28; *Finkbohner v. Glens Falls Ins. Co.,* 6 Cal. App. 379, 381.

(3) A strict interpretation of the word controlled would mean that the Neil Company would be paying two premiums to cover a single risk—such is not a construction that is favorable to the insured and should not be indulged in. *Yoch v. Home Mutual Ins. Co.,* 111 Cal. 503, 34 L. R. A. 857, 44 Pac. 189.

(4) Control means right of management; its meaning is clear and the policy must be interpreted according to its terms. *Brichell v. Atlas Assur. Co.* (*supra*). Exclusions are to be enforced according to their terms. *Speirs & Co. v. Underwriters at Lloyd's,* 84 Cal. App. 2d 603.

III.

Conclusion.

In conclusion, it is respectfully submitted:

(1) That the acts of negligence of the employees of the Neil Company which proximately resulted in the injuries to Carter were not acts of corporate policy and the Neil Company is liable therefor only under the doctrine of *respondeat superior.*

(2) On the basis of the facts judicially before the court below, the Statute of Limitations had not run against the right of the Neil Company to recoup itself against the negligent employees for sums paid out because of its liability under the doctrine of *respondeat superior,* and by the same token, the subrogation rights of Pacific against the negligent employees had not outlawed.

(3) Under the facts set forth above, the Court in a declaratory relief action will avoid circuity of action and will declare primarily liable that insurer which insures the negligent employees as was done in *United Pacific Ins. Co. v. Ohio Casualty Ins. Co.,* 172 F. 2d 836; *U. S. Fidelity and Guaranty Co. v. Church,* 107 Fed. Supp. 683; and *Maryland Casualty Co. v. Employers Mutual Liability Co. of Wisconsin,* 208 F. 2d 731.

(4) In any case, the Pacific policy is not applicable because the Neil Company did not have control of the premises where the unloading was being performed and this accident would not have happened except for this

inability of the Neil Company to, in *any* manner, control the California Electric Power Company from scheduling crews on these premises when it wanted and doing work thereon when and how it wanted.

Respectfully submitted,

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No. 14254.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,

Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of the Case.

For the purpose of this appeal, there are only two insurance companies involved in the action for declaratory relief.

The present action was brought in the United States District Court for the Southern District of California, Central Division, where originally four insurance companies were litigating their respective liabilities, under their respective policies of insurance. Two of the insurance companies, Anchor Casualty Company and United States Fidelity & Guaranty Company, insured the Minnesota Mining & Manufacturing Company, but they were granted motions for summary judgment in their favor in

the District Court. The Pacific Employers Insurance Company, hereinafter called Pacific, is the appellant, and Hartford Accident & Indemnity Company, hereinafter called Hartford, the appellee, both insured William P. Neil Company, Ltd., a corporation, hereinafter called Neil Co.

Pacific appeals from the judgment of the lower court which held that Pacific and Hartford were co-insurers of Neil Co.; that they were both liable and responsible for payment of damages to R. D. Carter for personal injuries he received while working on the premises owned by Minnesota Mining and Manufacturing Company; that the co-insurance created equal liability and responsibility is not reduced or affected by any "subrogation" claim of the defendant Pacific; that since both companies had a previous agreement whereby each had paid one-half of the money owed Carter under a settlement negotiated by Hartford, there was nothing due and owing from one party to the other.

The accident, which was insured against by the two parties to this appeal, occurred on November 18, 1947, when one R. D. Carter was working as an employee of the California Electric Power Company on the premises owned by Minnesota Mining and Manufacturing Company. He was working in an area beneath and beside a retaining wall which had been built by the Neil Co., the general contractor in charge. There was a backfilling operation going on at the time by the Neil Co. under the general supervision of Andrew Jensen, and more particular direction by the two foremen in charge, Hubert Jones and Robert Grace, both supervisory employees of Neil Co. The latter two men were in charge of equipment and men in this particular area, and the truck being used

at the time was owned by Minnesota Mining and Manufacturing Company, but loaned to the Neil Co. for their use.

The driver of the truck, Walker, was a Neil Co. employee, and was being directed by a flagman, Ford, also a Neil Co. employee, as to where to dump the load. The load was dumped close to the wall where the dirt was already level with the top of the wall or a little above. Some of the material, a large rock, went over the wall and fell upon Carter, injuring him.

Carter filed a complaint for damages in the Superior Court of the State of California, in and for the County of Riverside, alleging that defendants Minnesota Mining & Manufacturing Company and Neil Co. were negligent in the building operation and that this negligence was the proximate cause of his injury.

Thereafter this action for declaratory relief was filed, but that before said action could be tried, Hartford Accident and Indemnity Company and appellant Pacific Employers Insurance Company entered into a contract whereby appellee Hartford could negotiate and settle Carter's claim, and the agreement provided further that each would pay one-half of the amount, but that this would not in any way affect the declaratory relief action pending, and that each would be bound by the court's decision.

Statement of the Evidence.

The two insurance companies involved in this appeal issued insurance because of an agreement entered into by the Neil Co. and Minnesota Mining & Manufacturing Company. [R. p. 191 etc.] Pursuant to some of the terms agreed upon, Neil Co. was bound to purchase in-

surance. Now the importance of the contract lies in several of the clauses, *i. e.:*

Article 8 [R. p. 198] where the owner of the premises, Minnesota Mining & Manufacturing Company, retained the right to perform work as it deemed necessary. This of course implies that the contractor, Neil Co., was to have complete supervision, and exercise control, but that the owner "Reserved the right" to come upon the premises and do such work as it desired.

Article 15 [R. p. 202], where the owner "shall have the right to inspect the work" etc. This also implies and shows the intent of the parties that Neil Co. was to be in control, but that of course the owner has the right to inspect as the job proceeded.

Article 16 [R. p. 202], where the permits were to be obtained by the contractor, and not the owner, implying that the contractor was the moving party in controlling what went on and any of the preliminary procedure.

Article 20 [R. p. 205], whereby the contractor was to check on all labor and material, and that the owner should be afforded access to the work going on and see the material and inspect the books and records. This clearly points up how the control of the premises was given to Neil Co. and how the Minnesota Mining & Manufacturing Company had to reserve to itself the right to come on the premises.

Article 24 [R. p. 206], signifies how it was the contractor's responsibility to examine and determine the use of the building site.

Article 26 [R. p. 207], points up how the contractor is responsible for the work, and to take

charge of it and be responsible for any loss or injury from any cause.

Article 27 [R. p. 207], where the contractor was to provide all danger signals and warnings.

Article 34 [R. p. 208], declares that the contractor has the burden of laying out all work, and verify dimensions of old work, which would be affected and be added to by the contractor.

In referring to the Pacific policy [R. p. 41], it is noted that the insuring clause is of the broad comprehensive type, and only limited by the stated exclusions. Since this policy was entered into because of the agreement between Neil Co. and Minnesota Mining & Manufacturing Company pursuant to Section 18(b) [R. p. 204], the intent of the parties is signified by the facts of the type of policy purchased, that is, to cover in the broadest, general terms the work of the contractor on this particular project, including automobiles on the premises controlled by Neil Co.

The Hartford policy [R. p. 23] is an automobile policy purchased to insure the contractor as to all motor vehicles used by it in the work and belonging to it.

An easement was given by the owner of the property to California Electric Power Company for the purpose of allowing the "Power Co." to install, maintain, repair, and replace electric lines and cables upon, over and across the property owned by Minnesota Mining and Manufacturing Company. [R. p. 429.]

Neil Co. was to construct a granules plant, and the contract called for a cost plus operation. Because part of the contract called for leveling and building of a retaining wall where an electric substation could be built, part of a hill was dug away and a concrete retaining wall

erected. In the above operation and in backfilling behind the wall, Neil Co. used two Euclid trucks, besides other equipment, under an oral agreement with the Minnesota Mining & Manufacturing Company [R. p. 219], and such trucks were under the control of Mr. Jones, a Neil Co. employee. [R. pp. 312, 370.] The operators of the trucks were under Mr. Jones' control. [R. p. 371.]

Immediately previous to the time of the accident on November 18, 1947, there had been a backfilling operation under the direct supervision of Mr. Jensen and Mr. Jones. The driver of the truck, Walker, and the flagman who was directing him where to dump, after lunch dumped one or two loads [R. p. 156], when the load that caused the accident was dumped and a large rock went over the retaining wall and struck Carter. On November 16, 1948, Carter commenced an action in the Superior Court of the State of California in and for the County of Riverside against Minnesota Mining & Manufacturing Company, the Neil Co. and others, seeking damages in the amount of $53,534.72. [R. pp. 69, 74-80.]

On March 18, 1950, this present action for declaratory relief was filed by Hartford. Later, on January 15 and 17, 1951, Hartford and Pacific agreed [R. pp. 132-136] to authorize Hartford to settle the Carter case, subject to protection of the rights of the two insurance companies pursuant to the agreement, which in effect stated, that by settling there should be no prejudice as to any of the rights under the respective policies, and when the declaratory relief action was adjudicated the parties would pay in accordance with that decision any money that they would have been required to pay had the declaratory relief action been pronounced prior to judgment in the Carter case.

(a) Neil Company Employees, Their Connection With the Project, Their Duties, Actions, and Pertinent Statements.

William P. Neil, President of the Neil Co., came upon the premises and inspected the site and the progress of the work about once every two weeks to once a month. [R. p. 403.] The Neil Co. drew all the plans and did all the engineering during the entire course of the construction. [R. p. 390.]

David H. Archibald was the Vice President of the Neil Co., and he visited the premises and issued orders to Jensen, the general superintendent. [R. p. 387.] Mr. Archibald states that Nienaber, engineer for Minnesota Mining & Manufacturing Company, did not exercice any control over the number of employees. [R. p. 391.] There were no negotiations as to the use of the Minnesota Mining & Manucturing Company's trucks, only that Nienaber said to go ahead and use them. [R. p. 393.] The Neil Co. hired subcontractors. [R. p. 404.] The material that was brought in was not Minnesota Mining & Manufacturing Company's until it was finished and the invoice paid. [R. p. 409.] The Neil Co. even repaired the equipment of Minnesota Mining & Manufacturing Company, and also had it oiled, etc. [R. pp. 409-410.]

The superintendent for the Neil Co. on the job was one Andrew L. Jensen. [R. pp. 306-307.] Jensen states that he only once had a difference of opinion with Vroman of Minnesota Mining & Manufacturing Company as to how things were to be built and the costs involved, and Jensen prevailed, and he was never told to do a job in a particular way. [R. p. 309.] Neil Co. used all equipment, no matter who owned it, and also furnished the men to work the equipment. [R. p. 312.] Neil Co. constructed on all parts of Minnesota Mining & Manu-

facturing Company's property, and Jensen states that he believed he had power to tell California Electric when they could come in and start working [R. pp. 314-316], but apparently he didn't, as they came in anyway after he told them they were premature in their actions. They did leave when he first told them [R. pp. 316-318], but came back and went to work again later and Jensen knew this and he knew also his men were backfilling, but didn't tell the California Electric men to stay away. [R. p. 319.] Jensen said that someone told him that the Power Co. was there and that the dumping and backfilling was getting close to the top of the wall, underneath which the Power Co. was working, and that he sent Grace, a Neil Co. employee, to go up some time later and to "clarify" the matter, but not to "Stop" the operations. [R. p. 320.] Guards were hired by Neil Co. to watch over the construction area. [R. p. 325.]

Robert C. Grace was a labor foreman for Neil Co., and his superior in the Neil Co. was W. L. Crockett. [R. p. 70.] He was in charge of John Ford, the flagman, a Neil Co. employee, who directed the dumping of the trucks. [R. p. 171.] Mr. Grace had been in charge of building the retaining wall, and was at the time of the accident in charge of the operations involving the backfill. [R. p. 178.] Grace had been told by Jones to backfill on the day of the accident. [R. pp. 179-180.] Mr. Grace states that he told Fry (employee of Power Co.) to keep his men out until the dumping was over. [R. p. 182.] *He further stated that after the accident, Mr. Jensen asked if*

he hadn't got his message about stopping the backfilling process and he told him he had not. [R. p. 185.]

Hubert Jones was in charge of excavation and was under the orders from Andrew Jensen. [R. pp. 368-381.]

R. A. Walker was a driver of trucks, employed by Neil Co. [R. p. 138.] Hubert Jones was his immediate superior, and gave him his order to backfill on the day in question, along with another driver by the name of Foxx. [R. p. 147.] Mr. Ford, the flagman, was there spotting the loads for the drivers. [R. p. 149.] He had received no instructions from anyone as to keeping the loads small enough so that they wouldn't spill over. [R. p. 153.]

(b) Other Personnel in the Area.

A. L. Nienaber was a construction engineer, and was the representative of the owner on the premises. [R. p. 229.] An auditor was the only other Minnesota Mining & Manufacturing Company employee on the premises, except when Mr. Vroman came out periodically. [R. p. 234.] He states that the Neil Co. kept guards there to keep unauthorized persons out of the area. [R. p. 238.] He further states that he didn't make inspections to supervise. [R. p. 249.] Mr. Nienaber never seemed to supervise or exercise any control, but, on the contrary, when he saw something that needed changing, he would call it to the attention of Jensen, and if not acted upon, to Mr. Neil himself. [R. pp. 254-255.] At the time of the accident the trucks were in the possession of the Neil Co. and used by them exclusively. [R. p.

283.] The equipment was turned over completely to Neil Co. for their use and not subject to any other supervision. [R. p. 286.] Nienaber was interested only in the end result of the construction for his company, and no one from Minnesota Mining & Manufacturing Company ever directed the detailed operation of any of the work. [R. p. 287.]

California Electric Power Company had a crew on the premises of Minnesota Mining & Manufacturing Company under the direction of R. R. Fry. [R. p. 347.] He states that he was never told not to work in the area where the accident occurred. [R. p. 353.] He stated that the dirt was up over the level of the wall. [R. p. 358.]

H. G. Paxon qualified as an expert in underwriting insurance contracts, and stated that the word "control" as set forth in Pacific's policy, meant "Work place," like a place where any contractor worked. [R. p. 419.] He further stated that he had talked with contractors, and it was with this type of policy (Pacific's) in which they covered their liability in their work places. [R. p. 422.]

The pertinent language of the policy in regards to "control," appears under the exclusion:

> "This policy does not apply: (a) Except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of (1) automobiles while away from premises owned, rented or *controlled* by the insured or the ways immediately adjoining, or . . ." [R. pp. 43-44.]

ARGUMENT.

A. There Is No Primary or Secondary Insurance Theory Applicable in California.

Appellee respectfully submits to this honorable court that the substantive law of the State of California has steadfastly held that there is no such doctrine as propounded by the appellant, to wit, different degrees of liability in relation to joint liability for torts.

The case of *Consolidated Shippers, Inc. v. Pacific Employers Ins. Co.,* 45 Cal. App. 2d 288, 293, 113 P. 2d 34, holds that there is no law in the state, nor case upholding the theory of primary and secondary liability. The court there says at page 293:

> "Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and we know of no law in this state fixing degrees of liability in relation to joint liability for torts. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone (Schilling v. Central Calif. Traction Co., 115 Cal. App. 30 [1 P. 2d 53]), or against both jointly, it would seem that there could be no such thing as primary and secondary liability.
>
> ". . . In view of our conclusion that both policies insured the same risk so far as a plaintiff is concerned, the fact that plaintiff's liability may have been primary or secondary becomes immaterial. Regardless of the nature of such liability, any loss resulting therefrom was covered by both insurers."

A later California case, *Air Transport Mfg. Co. v. The Employers' Liability Assurance Corp.,* 91 Cal. App. 2d 129, 132, 204 P. 2d 647, holds that

> "Another line of authorities holds that each insurer is primarily liable for the losses of its named assured and secondarily liable as an excess carrier for other losses. (Citing non-California cases.) This principle cannot apply in California for the reason that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission. (Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal. App. 2d 288 (114 P. 2d 34).)"

In a recent California case, in which Pacific Employers Insurance Company was an appellant, the court again reiterated its previous position, *Employers Liability Assurance Corp. of London, Eng. v. Pacific Employers Ins. Co.,* 102 Cal. App. 2d 188, 227 P. 2d 53 at 193:

> "The theory that the insurer covering the primary tort feasor is liable to its policy limits and the insurer covering the secondary tort feasor is liable for excess insurance only has been rejected in California. (Consolidated Shippers, Inc. v. Pacific Emp. Ins. Co., 45 Cal. App. 2d 288, 114 P. 2d 34; Air Transport Mfg. Co., Ltd. v. Employers' Liability etc. Corp., 91 Cal. App. 2d 129, 204 P. 2d 647.)"

From the foregoing substantive law, it must be concluded that the trial court decided correctly that the two parties to this action were co-insurers, and that the loss should be apportioned equally, as per the rule as set forth in *Lamb v. Belt Casualty Co.,* 3 Cal. App. 2d 624, 40 P. 2d 311.

It is further respectfully urged that this honorable court apply the above substantive law of California to

the case at bar, such law was probably cited to the court in the *United Pacific Ins. Co. v. Ohio Casualty,* 172 F. 2d 836, and was discussed in *Canadian Ind. Co. v. United States Fidelity and Guaranty Co., et al.* (C. C. A. 9th), decided on June 15, 1954. These cases, though, have no facts similar to those of this case. The previous cases relied on facts adjudging the employer liable on the application of the doctrine of *respondeat superior,* whereas in the case at bar the employer-insured is liable without such a doctrine, and here the insured is not the plaintiff.

B. There Is No Basis Upon Which Appellant May Claim Any Right to Subrogation.

(1) There Is No Contribution Between Joint Tort Feasors Under California Law.

Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875;

Jackson Co. v. Woods, 41 Cal. App. 2d 777, 107 P. 2d 639.

In effect Pacific is asking this court to allow Pacific to be subrogated to the Neil Co. position, who ordinarily would have a cause of action for recoupment against its negligent employee, the flagman Ford, or the driver Walker. But in this case the lower court properly found that Neil Co. itself was guilty of negligence, independent of the negligent operation of the truck and flagman. Since this is true, if a right of subrogation were allowed, this would be granting a contribution between joint tort feasors, in that the insured, Neil Co., and the flagman and the driver were negligent. This particular operation was the result of negligence on the part of the supervisorial employees of Neil Co., *solely insured by Pacific.* Further, in any action brought by Neil Co. against its

employees, they would have available to them the defense of contributory negligence on the part of the Neil Co., because of the negligence of their key supervisory men. This would reward the company for directions given to workmen which were negligently made, asking the workman to pay to the employer for the bad results of the orders given by the employer. This would be asking the court to do something it may not do. In *Liverpool, London & Glove Ins. Co. v. Southern Pac. Co.,* 125 Cal. 434, 58 Pac. 55, the court stated the rule that an insurance company may subrogate itself to the rights of its assured, but only if there was no contributory negligence on the part of the insured.

It must be noted that the facts in this present case are not similar to the cases cited by appellant, *i. e., United Pacific v. Ohio Casualty, supra; Maryland Casualty Co. v. Employers Mutual Liability Co. of Wisconsin,* 208 F. 2d 731, and recent case of *Canadian Ind. Co. v. U. S. F. & G., supra.*

In all of the above cited cases, there were *no* facts whatsoever making the party insisting on subrogation liable, those cases being cases involving strictly two automobile policy coverages, whereas in the case at bar the party to whom Pacific desires to be subrogated, Neil Co., are insured by Pacific as to all acts, and Neil Co. was specifically found by the lower court to be negligent in the acts of its supervisorial employees which caused the accident. Hartford did not insure those acts or those employees.

(2) That Even if the Court Could Possibly Find Some Right to Subrogation in Regards to Pacific's Claim, This Right Had Not Been Exercised and Has Been Barred by the Statute of Limitations, California Code of Civil Procedure, Section 340, Subdivision 3.

California law does not agree with the theory put forth by appellant, that the statute of limitations is based on an implied contract of indemnity. California distinctly holds that in an action by the insurer subrogated to the rights of an insured for his negligence, the insurer is subrogated to the same statute of limitations as the insured. (*Automobile Ins. Co. of Hartford Conn. v. Union Oil Co. of Calif.*, 85 Cal. App. 2d 302 at 304, 193 P. 2d 48.) California's statute of limitations is one year for personal injury actions due to negligence. Thus when Pacific paid money on its share of the settlement with regard to R. D. Carter on January 27, 1951, this cause of action for subrogation was barred on January 27, 1952, which was before the trial and submission of this declaratory relief action, and no action on its so-called subrogation was ever begun. Since Pacific desires to be subrogated to the Neil Co. position, it is only proper that the court determine whether or not any further adjudication would be futile, *i. e.,* because any action that Pacific might bring would have as valid and conclusive defense the statute of limitation, contributory negligence, and the rule against contribution between joint tort feasors.

Appellant's citations in regard to an implied contract of indemnity may very well be true, but they do not pertain to the case at bar, where there is the problem of a subro-

gation right. In *Bradley v. Rosenthal, supra,* the case dealt with the question of possible recoupment by the principal from his agent, for money expended by the principal because of liability fixed on the principal for the negligent acts of the agent, because of the doctrine of *respondeat superior.* This is recoupment, not subrogation.

Appellant also cited *Crystal v. Hutton,* 1 Cal. App. 251, 81 Pac. 1115. This case involved a person who signed a promissory note as a co-maker, but designated himself as a surety, and when he was forced to pay the note, his sole remedy is against the principal maker of the note on an implied obligation to reimburse, and the statute of limitaitons is two years for this contract matter that was not in writing.

Appellant's only other citation as to the statute of limitation is *Bray v. Cohn, 7* Cal. App. 124, 93 Pac. 893. In this case there was a surety on a written promissory note, and after he had been forced to pay it, the court held that his remedy was on implied obligation against the principal maker of the note, and that the statute of limitation on such an implied contract was two years. Again, this has no relevancy with the facts at hand.

As to the effect of the agreement entered into between Hartford and Pacific [R. pp. 132-136], this agreement stated that there would be no waiver of any rights under the policies. This of course meant that any defenses or exclusions as to the insured would still be available, and further the provision relating to paying the sums as they would have been required to pay had the declaratory relief

judgment been before settlement of the Carter case, only referred to the possibility of having the declaratory relief judgment declare the rights differently. This in no way implies any intent to withhold the running of a limitation of action, as that defense would be available as a personal defense to the truck driver and the flagman. If the declaratory relief judgment had come first before the Carter settlement, then the statute of limitation would begin when the settlement of the Carter action was effected, as was the case at bar, and there would be still present one year from the time of such settlement to commence a subrogation action. This Pacific and Neil Co. did not do.

(3) The Court Has No Authority to Establish Subrogation Rights and Liabilities in This Action.

Pacific's prayer in their answer in the case at bar makes no provision for the order or findings in regard to any subrogation rights, and it is the familiar rule that this point can't be first raised on appeal. Secondly, that in the Carter action, the flagman and truck driver were not made parties, so their liabilities in that action were not litigated.

Appellant is apparently urging that the *United Pacific Ins. Co.* case, *supra,* decided such an issue and that this is binding on this court. It must be noted that on page 840, note 4, of that case the counsel to the action stipulated and agreed to have all issues decided, and it appears without this the court thought it didn't have authority or jurisdiction to decide the subrogation issues of another action.

C. The Supervisory Employees of Neil Co. Were Negligent, and This Distinguishes This Present Case From That of United Pacific Ins. Co. v. Ohio Casualty Ins. Co., and Canadian Indemnity Co. v. United States Fidelity & Guaranty, Et Al.

(1) The finding of the lower court, XXV [R. p. 120], that the supervisory employees of Neil Co., other than the truck driver, were negligent in the management of loading and dumping operations, and that this contributed proximately to the accident and injuries of R. D. Carter are substantially supported by the facts as set forth in appellant's statement of facts in regard to Robert C. Grace, the labor foreman over the flagman, and Hubert D. Jones who was in charge of the truck drivers, and Andrew Jensen, General Supertintendent of the Neil Co. These three men had supervision and control over the area in question where the backfill was taking place, and they all negligently allowed the continuance of such backfilling, even after they knew others were working under the edge of the wall, and that the dirt was up to the edge of the wall and liable to spill over and down into the area where the Power Co. was working. They knew it was dangerous and had ordered out the Power crew once because of this danger, but did nothing effective when they returned to work, even though the job was even more dangerous because the fill had reached the top of the wall or even over the top, and knowledge of the danger was proven by the order to stop the dumping, which order was negligently not delivered.

It must be noted that negligence is either an act of omission or act where there is a duty owing, and there is no more culpability of the neglect whether it be active or passive.

In *Basler v. Sacramento Gas & Elec. Co.,* 158 Cal. 514, 111 Pac. 530, where at page 518 the court stated:

> "It is also true that negligence may be active or passive in character. It may consist in heedlessly doing an improper thing or in heedlessly refraining from doing the proper thing. Whether the circumstances call for activity or passivity, one who does not do what he should is equally chargeable with negligence with him who does what he should not."

(2) Under California law, the acts of the negligent supervisory employees are acts of the corporation and the negligence of the corporation is direct, and not based upon the doctrine of *respondeat superior.*

Upon close examination of the case that appellant urges is so binding on this point, that of *Bradley v. Rosenthal,* 154 Cal. 420, 97 Pac. 875, it will be noted that the case does not stand for all that appellant believes it does. The facts were that there was serious dispute as to whether or not Rosenthal was an agent of the corporation he claimed to work for, and that is in no way similar to the facts at bar, where there were men of supervisory caliber supervising and controlling the Neil Co. operations as an independent contractor. The facts in the *Bradley* case were that the jury found Rosenthal not liable, and yet found the telephone company liable, and the appellate court expounded the recognized rule in reversing the judgment that it must be an act of the corporation to make it liable alone and not by some imputation from an agent or employee. In the case at bar there is substantial evidence as pointed out that the company was liable alone and not through any imputation. Besides, in the *Bradley* case, the corporation was found not liable by the appellate court because there was a doubt as to whether it had even given any instructions to Rosenthal, or just whether

Rosenthal was to do the work and then sell his work to the telephone company.

Appellant is in error when he states that there has to be a directed act, by the corporation, to make them directly liable, and not just liable because of some inputation of negligence. He is correct if he means that directed acts cover the general corporate policy, especially where contractors are involved. Even both cases cited by appellant to show there were exceptions to his contended rule, uphold appellee's position. The cases are *McInerney v. The United Railroads,* 50 Cal. App. 538, 195 Pac. 958, and *Benson v. Southern Pacific,* 177 Cal. 777, 171 Pac. 948, and both of them do not meet appellant's contention as to a directed act. In the *McInerney* case, the corporation had a policy during the strike to protect its property, not to break up the strike as suggested by appellant, and that they were to use all lawful means in protecting its property and keeping the trains moving. Those were the only directions given, or in reality, no orders as such, but just a policy to do their job, that was to keep transportation moving. This is of course closely akin to that of our case, where there were no orders as such, only policy to get the job done, and as quickly as possible, as cited in the evidence.

In the *Benson* case the only policy involved was that of meeting a schedule of time, and speed was permitted to meet that schedule. There was no direction as such, just as there was none in the *McInerney* case, and in both of those cases the corporate defendant was held liable while the acting agent was found not liable, and exonerated, thus meeting directly the case at bar, so as to show that the corporation can be negligent itself in its operations, and if such be true, then they would have no right to any subrogation, because they themselves were negligent.

Another case in point is that of *McCullough v. Langer,* 23 Cal. App. 2d 510, 73 P. 2d 649, where the court held that the employer, a doctor, was not liable under *respondeat superior* only, but rather as a joint participant, so that the nurse could be found non-negligent, and yet find the doctor negligent as an employer, and the court cites on page 516 the *Benson* and *McInerney* doctrines with approval.

In the case of *Newman v. Fox West Coast Theatres,* 86 Cal App. 2d 428, 194 P. 2d 706, the facts were that the plaintiff sued the manager and the owner-corporation for an injury from slipping in the ladies' room. The jury exonerated the manager, but held the defendant theatre corporation liable. On appeal the court held that the owner-corporation was a joint participant and could be liable alone, or with the manager, in that it was its policy and rules that made it liable, and was not just liable on the theory of *respondeat superior.*

The case at bar is even stronger for applying liability against the contracting corporation directly, and not on any basis of *respondeat superior,* in that there was the policy to keep the work speeded up, and there was a general superintendent on hand at all times who represented directly the corporation through its designated officers, Mr. Neil and Archibald. Thus the supervisory employees were carrying out and furthering corporate policy, as directly as possible when an entity is involved, and it would be unjust not to be able to hold a corporation directly liable for the negligent acts or omissions of its supervisory help, even though the supervisor might himself be found not negligent. They ordered the work to proceed and were warned of its danger, realized the danger, and negligently failed to stop the work.

D. The Neil Co. Did Have Control of the Premises Within the Meaning of the Pacific Insurance Policy.

(1) Insurance Policy of Pacific and Its Meaning.

Understanding now that insurance policy issued by Pacific was done to meet the agreement entered into between Neil Co. and Minnesota Mining & Manufacturing Company, it is important to note the language of the policy itself. [R. p. 41.] The insuring agreement is of the usual broad, comprehensive type, purchased, as is admitted by appellant in order to fulfill Neil Co.'s promise to buy this type of insurance. [R. p. 204.] The insurance was to cover

> ". . . to protect the Contractor from damage claims arising from operations under this contract, as shall protect it and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including accidental death, as well as from the claims for property damage which may arise from operations under this contract, whether such operations be by itself or by any subcontractor or by anyone directly or indirectly employed by either of them."

This is what the insurance was to cover, and it shows clearly the *intent* of the parties to be fully covered, and there was no thought that this contract wasn't directly written for and aimed at covering all the construction and automobiles on the Minnesota Mining and Manufacturing Company premises. It seems then unjust that now when there is some claim under the contract that the insurance company can come in and say, we never covered any of your trucks where you didn't control the premises, and of course Neil Co. didn't control that area in which

the accident occurred. This would mean in effect that there was never any insurance coverage if the appellant's position were followed. They should be estopped from asserting such a position!

The clause they rely on is the exclusion (a) [R. pp. 43-44]:

> "This policy does not apply: (a) Except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of (1) automobiles while away from premises owned, rented or controlled by the Insured or the ways immediately adjoining or . . ."

The truck in question was not away from the premises "controlled" by the insured. The general rule is cited in *Goss v. Security Ins. Co.,* 113 Cal. App. 577, 298 Pac. 860 at 580:

> "A policy or contract of insurance is to be construed so as to ascertain and carry out the intention of the parties, viewed in the light of surrounding circumstances, the business in which the insured is engaged and the purpose they had in view in making the contract."

(2) General Business Understanding as to "Controlled Premises."

Neil Co. was an independent contractor, and under general business practices had control and supervision over the area in which they worked. Mr. Paxon, an expert witness, testified that the word "control" would be synonymous with the words "work place." [R. p. 419.] There was never any indication from any of the evidence gained in this action, that Neil Co. didn't completely supervise and run the construction, and be able to maintain guards

to keep unauthorized personnel off the premises. In a narrower sense, it would be necessary only to show control in the area in which the accident took place, and this is shown by Jensen telling the Power Company to leave at one time, and they followed his orders. [R. pp. 317-318.] Another Neil Co. employee had charge of the area of backfilling, Robert Grace [R. p. 178], and this is where the dumping was being done and where the accidental event started and surely where Neil Co. had at least temporary exclusive control.

The existence of an easement in no way limits the control of the owner, except as to that which was intended by the grant. As was stated in *Langaza v. San Joaquin L. & P. Corp.*, 32 Cal. App. 2d 678, 90 P. 2d 825, at 686:

> ". . . The record shows that the owner of the real property granted a 'right of way' to the power company over a strip of land 20 feet in width, with the right to erect a single line of towers or poles thereon and wire suspended thereon. 'The rights of any person having an easement in the land of another are measured and defined by the purpose and character of that easement; and the right to use the land remains in the owner of the fee so far as such right is consistent with the purpose and character of the easement' (17 Am. Jur. 993)."

Thus, in the case at bar the owner still had the right to control the land and Minnesota Mining & Manufacturing Company gave this right to Neil impliedly or expressly by having Neil Co., as independent contractors, manage the whole operation. It is inconceivable that Pacific can

assert that because someone has an easement in gross for ingress and egress that this stops anyone else from having control.

As cited in *J. G. Speirs & Co. v. Underwrites at Lloyd's,* 84 Cal. App. 2d 603, 191 P. 2d 124:

> "In Rose v. Union Gas & Oil Co., 297 F. 16, it (control) is defined as follows: 'The word control does not import an absolute or even qualified ownership. On the contrary it is synonymous with superintendence, management, or authority to direct, restrict, regulate.' "

That is the type of "control" that the appellee claims was meant, supervision, etc. The *Speirs* case, *supra,* also cites with approval cases standing for the same proposition, *i. e.,* that control does not mean complete control, citing *Dinan v. Superior Court,* 6 Cal. App. 217, 91 Pac. 806; *McCarthy v. Board of Supervisors,* 15 Cal. App. 576, 115 Pac. 458; and *Coffey v. Superior Court,* 146 Cal. 525, 82 Pac. 75.

As to appellant's argument that if Neil Co. had complete control of the premises the accident would never have happened, this is wishful thinking, as the Power Company had been told to stay away, but they did not do so, and Jensen decided to stop the dumping, but negligently failed to do so.

In *Louthan v. Hewes,* 138 Cal. 116, 70 Pac. 1065, at 119, the court held that even though the owner kept possession of the premises where the independent contractor was working, the builder-contractor had control of the work under the contract.

Conclusion.

It is respectfully submitted:

1. That the two policies of insurance under the facts as stated both covered the risk involved, and as a result the two companies were co-insurers.

2. That the corporation, Neil Co., was negligent by the acts of its supervisory employees, and not solely liable due to the application of the doctrine of *respondeat superior* as to the driver or the flagman of the truck.

3. That Neil Co. controlled the premises where the construction was being done, and especially in the area of the backfilling process, from whence the rock came that injured R. D. Carter, and therefore Pacific insured the automobile during its use by Neil Co. at the time of the accident.

4. That the easement granted to the California Electric Power Company in no way lessened the control of the Neil Co. as to the premises in regards to coverage as intended and purchased from Pacific, in reference to the automobile truck used by them.

5. That there is no basis for subrogation, in that to allow such a right would be declaring a right in a party when that party was personally guilty of independent negligence in regard to the accident in question, and the insurance company asking such right insured it for those negligent acts.

6. That the statute of limitations had run against Pacific before this present action was tried, so as to bar any further action on their part, they having failed to commence their actions against the driver or flagman.

7. That there is not in California according to its substantive law any such theory as propounded by appellant in regard to primary and secondary liability, and the case of *Eirie v. Tompkins,* 304 U. S. 64, would require this court to follow the California decisions so declaring.

8. That this honorable court will find substantial evidence to sustain the trial court, and will follow the required procedure of drawing every favorable inference in favor of appellee (*Hunter v. Shell Oil Co.,* 198 F. 2d 485; *Insurance Co. of North America v. Board of Education of Independent School District No. 12,* 196 F. 2d 901) which would require an affirmance of the trial court's decision.

We respectfully urge that the appeal herein is without any merit whatsoever and is not based upon the facts in the case.

Respectfully submitted,

James V. Brewer,

Attorney for Appellee.

No. 14254

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,

Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

Appellee's Statement of the Evidence.

Appellee, beginning on page 4 of its brief, quotes the Agreement between the Neil Company and Minnesota Mining Company, and argues from such quotations that this shows that the Neil Company was to have complete supervision and exercise control over the premises on which the accident occurred. We believe, to the contrary, that the Agreement shows that the Neil Company did not have complete supervision and control over the premises because the Minnesota Mining Company not only had the right to amend, add to or change the plans and specifications at any time during the course of the work (Art.

1), but it also reserved the right to perform such work as it deemed necessary or expedient on the premises at any time. (Art. 8.) But the main point which Appellant makes is that the Neil Company did not have control of the premises as against the California Electric Power Co. At page 7, Appellee states that:

> "The Neil Company drew all the plans and did all the engineering during the entire course of the construction."

This is not true as to the work done on the substation where the accident occurred. As to the substation, the California Electric Power Co. prepared its own plans for the power station site, including details of the retaining wall [R. p. 435], and when the blueprints of the substation site which the Neil Company prepared did not conform to the blueprints for the site which the California Electric Power Co. had, the Neil Company changed its blueprints to conform to those of the California Electric Power Co. [R. p. 351.]

Appellee, at page 9 of its brief, cites, as evidence of control of the premises by the Neil Company, the fact that it "kept guards there to keep unauthorized persons out of the area." But such guards were not effective against the employees and the crews of the California Electric Power Co. The evidence shows that the California Electric Power Co. employees and crews went on the premises whenever its construction operations required it, and they were not stopped at any time at the entrance to the premises, nor did they have to secure permission from the Neil Company to go upon the premises. [R. pp. 437-438 and 441-442.] Unlimited and uncontrolled admission of California Electric Power Co. crews to the premises for substation construction work was not a matter of grace,

but a matter of right; the California Electric Power Co. crews prosecuted this construction work under an easement in gross, given it by the Minnesota Mining Company; the California Electric Power Co. was not a subcontractor of the Neil Company, but acted independently of it under rights given it directly by the owner.

II.

The California Cases Cited by Appellee Are Not Determinative of the Question of the Existence of the Primary and Secondary Insurance Doctrine in California.

As its first point under its argument, Appellee claims there is no primary or secondary insurance theory in California, and has cited three cases which, it is claimed, support this proposition. While there is language in these cases which upon cursory examination would appear to support the proposition advanced by Appellees, a careful analysis will show not only that the reference to primary and secondary insurance is unnecessary to the decisions, but also that the cases are factually and legally distinguishable from the case at bar.

The first case cited is *Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.* (1941), 45 Cal. App. 2d 288, 113 P. 2d 34. This action was brought by Consolidated Shippers, the insured under two policies, one issued by Pacific Employers and the other by Commercial Standard Insurance Co., for a loss sustained by Consolidated. Commercial had issued a policy of public liability insurance insuring one Harvey and/or Consolidated against loss arising from the ownership, maintenance or use of a Chevrolet truck owned by Harvey. Pacific issued a policy of public liability insurance under which it insured

Consolidated alone against loss by reason of liability imposed by law resulting from the operation of all automobiles other than those owned by Consolidated which transported goods on a contract basis for Consolidated.

At a time when both policies were in effect, Harvey, while transporting merchandise in his Chevrolet truck under contract with Consolidated, was involved in an accident, and in the subsequent action a judgment was rendered against Consolidated. It is noted that both policies contained provision for proration of insurance. In the action by Consolidated against the insurance companies the trial court found Commercial primarily liable with Pacific secondarily liable after the exhaustion of Commercial's policy limits. The District Court of Appeal affirmed the trial court originally, but on rehearing, reversed its first opinion as will be set forth hereafter. Justice Walton J. Wood dissented and in his dissent repeated the original opinion.

The true basis for the reversal is found in the Opinion at page 291:

> "While it is true that the Commercial policy covers Harvey as well as plaintiff, *there can be no doubt as far as plaintiff is concerned, that the risks covered by both policies were co-extensive.* If the policies had in effect the same coverage, neither could be primary, but both insurers were jointly liable." (Emphasis added.)

It must be noted that Appellee omits a significant part of the opinion in the quotation from this case found on page 11 of its brief. The opinion states at page 293:

> "Moreover, the court *made no finding on the issue of primary and secondary liability as between Harvey*

and plaintiff, and in fact made no finding concerning the relationship existing between Harvey and plaintiff out of which the latter's liability arose. In view of our conclusion that both policies insured the same risk SO FAR AS PLAINTIFF is concerned, *the fact that plaintiff's liability may have been primary or secondary becomes immaterial."* (Emphasis added.)

It is observed that in addition to there being no finding as to the relationship between Harvey and Consolidated and hence no basis for determining how Consolidated was held liable, the question of circuity of action was not raised. Where there is a basis for determining primary and secondary liability the question then is whether the one secondarily liable can recover from the one primarily liable. This, of course, was not raised, discussed or passed upon by the decision.

In view of the facts of the case and the specific language of this decision, it is submitted that it is not authority for the proposition that there is no primary or secondary liability in California.

The second case cited by Appellee is *Air Transport Mfg. Co., Ltd. v. Employers Liability Insurance Corp.* (1949), 91 Cal. App. 2d 129, 204 P. 2d 647. The language relied upon by Appellee in this connection is on page 132, and states:

> "This principle cannot apply in California for the reason that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission. (*Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.,* 45 Cal. App. 2d 288 (114 P. 2d 34).)"

The foregoing statement is erroneous in that it is contrary to the express provisions of Section 402 of the Vehicle Code of the State of California which reads as follows:

> "Section 402(d). In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence, such owner is subrogated to all of the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner."

Furthermore, the only authority cited for the proposition that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof is the *Consolidated Shippers* case, *supra,* which, as has been pointed out above, is not authority for such a principle.

Actually the *Air Transport* case is decided on a comparison of the escape clauses in the respective policies of the two insurance companies involved. In this connection, the case has been distinguished, and the actual holding clearly identified in *Gillies v. Michigan Millers, etc. Insurance Co.* (1950), 98 Cal. App. 2d 743, 221 P. 2d 272. The court said at page 751, referring to the *Air Transport* case:

> "There, the court decided one question. Was Employer's policy rendered void because of the existence of the other valid insurance? Or to be more specific, was the policy issued prior to that of Employers valid insurance within the meaning of the 'other insurance' clause of the defendant's policy? The court held that the term 'valid insurance' contemplated insurance which provides unconditional coverage and that since the Pacific policy afforded only prorate coverage, it did not meet the requirement . . ."

It is submitted that the *Air Transport* case cannot be considered authority for Appellee's asserted doctrine.

The third case cited by Appellee is *Employers Liability Insurance Corp. v. Pacific Employers Insurance Co.* (1951), 102 Cal. App. 188, 227 P. 2d 53. Again the court, in passing, rather than as a point for the actual decision of the case, states at page 192:

> "The theory that the insurer covering the primary tort feasor is liable to its policy limits and the insurer covering the secondary tort feasor is liable for excess insurance only has been rejected in California. (Citing the *Consolidated* case and the *Air Transport* case.) *Moreover, in the instant case, neither Appellant nor Respondent insured the party driving the car involved in the accident.*" (Emphasis added.)

In *Employers Liability Insurance Corp. v. Pacific Employers Insurance Co., supra,* the statements about primary and secondary liability are dicta as neither policy afforded extended coverage to the negligent driver and the dicta is supported only by the *Consolidated* and *Air Transport* cases. The decision in the case turned on the effect of the escape clauses in each policy and the court held that inasmuch as the policies had in effect the same coverage, neither could be primary, but both would be jointly liable.

In none of the three cases cited by Appellee and distinguished above was there raised or discussed the question of the ultimate circuity of action that might develop. Thus, these cases cannot be considered as authority against the points raised by Appellant in the present case, nor do they support the proposition that the decision of this court in *United Pacific Insurance Co. v. Ohio Casualty Insurance Co.,* 172 F. 2d 836, is contrary to California law.

Appellee urges that on the basis of the foregoing, the Appellant and Appellee were co-insurers and the loss should be apportioned equally in accordance with the rule in *Lamb v. Belt Casualty Co.* (1935), 3 Cal. App. 2d 624, 40 P. 2d 311. The cases mentioned above cannot be considered authority for such a proposition and the *Lamb* case is not at all in point. There the plaintiff was insured by two companies. In an accident, the plaintiff was himself negligent and no question was presented of liability solely through the act of any employee. Thus, where two companies insure the same party, no question is presented such as that involved in this present action.

It is submitted that the cases hereinabove discussed do not establish any substantive law on the point asserted by Appellee and are not authoritive on the issues here presented. The rules of law expressed in the line of cases commencing with *United Pacific Insurance Co. v. Ohio Casualty Insurance Co.* (9 Cir.), 172 F. 2d 836, are sound and it is submitted, are controlling on the question of primary and secondary liability under the circumstances of the cases at bar. We believe that this court has well distinguished the above cited California cases in *United Pacific Insurance Co. v. Ohio Casualty Co., supra,* where it points out on page 844 of its Opinion that as to the negligent employee, there is no double insurance. There is only one policy of insurance on the ultimately liable employee and *that* insurance must be the primary insurance.

III.

Pacific Is Subrogated to the Rights of the Neil Company Against Its Negligent Employees.

In the second main point of its argument, Appellee, beginning at page 13 of its brief, takes the position that there is no basis upon which Appellant may claim any right to subrogation. As a subheading, Appellee sets forth the proposition that "There is No Contribution Between Joint Tort Feasors Under California Law." As to this point of law standing alone, no one can take exception. The question is whether the Neil Company is a joint tort feasor along with its negligent employees. This, in turn, depends upon whether its liability for negligence is based solely upon the doctrine of *respondeat superior* or whether there is corporate negligence contributing proximately to the injury.

In furtherance of its argument, at pages 13 and 14 of its brief, Appellee takes the position that the supervisorial employees of the Neil Company were *"solely insured by Pacific."* Such is not true. The Pacific policy had *no* extended coverage provisions. It insured only the corporation—the Neil Company. The insurance status of the various persons involved in this matter is as follows:

(1) The Neil Company was insured by Hartford for automobile insurance including the loading and unloading of automobiles, and was insured by Pacific for general liability including automobile insurance under certain limited situations.

(2) The flagman, Ford, and the truckdriver, Walker, were insured only by Hartford under its extended coverage provisions extending coverage to employees engaged in the unloading of automobiles.

(3) The supervisorial employees, Jensen, Grace and Jones, had no insurance for their personal liability for negligent acts.

We believe that Appellee's argument that Pacific has no right of subrogation can be answered as simply as this: If the Neil Company itself were negligent, then it would have no right of action against its joint tort feasors, and by the same token, there would be no right of subrogation in Pacific. But, if the Neil Company was not negligent, then it would have a right of action against its employees for liability incurred by it caused by their negligence, and Pacific would be subrogated to this right of action.

In its Statement of the Evidence, Appellee has set forth what it believes to have been the negligence of the supervisorial employees of the Neil Company as follows:

(a) That Jensen sent a Neil Company employee to the substation site to "clarify" the matter, but not to "stop" the operation (Appellee's Br. p. 8);

(b) That Grace did not get Jensen's message about stopping the back-filling until after the accident had happened (Appellee's Br. p. 8); and

(c) That the fill had reached the top of the wall or even over the top and knowledge of the danger was proven by the order to stop dumping, which order was negligently not delivered (Appellee's Br. p. 18).

None of the acts outlined above by the Appellee are corporate acts or acts in furtherance of corporate policy. If, in fact, the fill had reached the top of the retaining wall, and Jensen did not order the back-filling to be stopped, his failure to do so could not be said to be in furtherance

of corporate policy, but simply an act of negligence on his own part. If, on the other hand, the court believes the other line of evidence which is to the effect that Jensen did order the back-filling to be stopped, but that the message was negligently delivered and did not reach Grace until after the accident had happened, such negligent delivery would not be in furtherance of corporate policy, but would be an individual act of negligence either of Jensen in failing to see that his message got through, or in the employee entrusted to make delivery of the message in stopping along the way.

IV.

The Right of the Neil Company to Recoup Its Losses From Its Negligent Employees Is Contractual in Nature and Governed by the Period of Limitations Applicable to Implied Contracts; Therefore, the Subrogative Right of Pacific to Enforce the Right of the Neil Company Had Not Been Barred by the Statute of Limitations.

Appellee's contention that the insurer is subrogated to the same statute of limitations as the insured is a correct statement of law (*Automobile Insurance Co. v. Union Oil Co.,* 85 Cal. App. 2d 302), but is not correctly considered in its application to this case in Appellee's brief. Appellee mistakenly goes on to assume, without citation of authority, that the insured is bound by the same Statute of Limitations in his suit for indemnification that the injured party was bound by in his original tort action. As we will show hereafter, such is not the law.

As stated in Appellant's opening brief, the right of the employer to recoup or indemnify himself for sums paid out because of the tortious acts of an employee is

based upon an implied contract of indemnity. This right of the employer is based upon the breach of a duty imposed upon the employee by law as an integral part of the contract of employment, whether this contract be express or implied. (See 35 Am. Jur. 530, Sec. 101.)

The right of the Neil Company to recover against its negligent employees is, therefore, contractual. Being contractual, and implied rather than express, the right is governed by the period of limitations prescribed in Code of Civil Procedure, Section 339(1). Any action by the Neil Company against its employees to recoup its losses incurred by reason of the negligent conduct of the latter, must be based upon the breach of this contractual duty; the Neil Company has no right to recover for personal injuries against those employees. Consequently, the provision of Code of Civil Procedure, Section 340(3) have no application to this right.

As stated by Appellee, Pacific is subrogated to the right of the Neil Company against the negligent employees. This right in Pacific is no more or no less than it is in the hands of the Neil Company. Since the right of the Neil Company is contractual in nature and governed by the Statute of Limitations prescribed by California law for implied contracts (Code Civ. Proc., Sec. 339(1)), so this same right in the hands of Pacific is governed by the same statute.

This same issue was passed upon by the Ohio Court of Appeals in the case of *Ohio Casualty Insurance Co. v. Capolino,* 44 Ohio L. Abs. 564, 65 N. E. 2d 287. In that action, the employer's insurer sought to recover from a negligent employee the sum paid to a third party as compensation for injuries caused by the negligence of

the employee. The employee's counsel argued that the action was barred by the shorter period of limitations prescribed for personal injury actions, whereas the insurer's counsel urged that the longer period of limitations prescribed for actions upon contract applied. The Ohio Court decided that the employer's right was based upon an implied contract of indemnity, and that the subrogating insurer's action to enforce that right was governed by the longer period, saying at page 565:

> "The plaintiff's contract of insurance was with the Equity Savings and Loan Company (employer), and upon settling a claim against its assured, became by its contract, subrogated to the loan company's rights. This action, therefore, is one in indemnity and sounds in contract and not tort." (Insert ours.)

Since the Neil Company's right to indemnify against the employees did not accrue until January 27, 1951, the date on which payment to Richard D. Carter was actually made, the Statute of Limitations would not bar the enforcement of such right until January 27, 1953. Pacific, being subrogated to this right of the Neil Company, had exactly the same period of time within which to enforce that right.

The argument of Appellee with respect to the effect of the agreement entered into between Hartford and Pacific [R. pp. 132-136] is an attempt to alter the intent of the parties expressed in clear and unequivocal language. The expressed intent of the parties to the stipulation was to forestall any claim of waiver of rights by virtue of the passage of time.

V.

The Court Has the Right to Establish Subrogation Rights in a Declaratory Relief Action.

Appellee argues that Appellant cannot first raise its claim of right of subrogation on appeal. Such is not the fact. In its answer, Appellant alleged its right of subrogation. [R. p. 63.]

Appellee further argues that the negligence of the employees cannot be determined because they are not parties. But under the issues, a specific finding of negligence was made. [R. p. 115.] The parties before this court are no different than the parties before the court in *Maryland Casualty Co. v. Employers Mutual Liability Co. of Wisconsin,* 208 F. 2d 731: In that case, two insurance companies were parties and the negligent employee was not a party; yet, in the declaratory relief action, the court made a finding on the negligence of the employee and the Appellate Court subrogated the secondarily liable insurance company to the recoupment rights of the employer.

VI.

The Finding of Negligence on the Part of the Supervisory Employees of the Neil Company Does Not Make the Corporation Liable as a Joint Participant, but Only Under the Doctrine of Respondeat Superior.

Appellee contends that the negligence of the Neil Company supervisory employees constitutes the direct negligence of the corporation so that the corporation becomes a joint tort feasor with the negligent employees. As has been pointed out, the negligence, if any, of the supervisory employees was that of omission rather than commission.

Appellee correctly states the law that negligence may be active or passive—the doing of a proper act carelessly, or the careless failure to do a proper act. (*Basler v. Sacramento Gas and Electric Co.,* 158 Cal. 514, 518, 111 Pac. 530.) That proposition of law, however, misses Appellant's point. The distinction between active and passive negligence becomes important only when the question of law is not as to the liability of the negligent employees themselves or of the employer under the doctrine of *respondeat superior,* but when the question of law is the liability of the corporate employer as a joint participant in the negligence. The corporate employer is not a joint participant in the passive negligence of its employees, whether supervisory or non-supervisory.

McInerney v. United Railroads, 50 Cal. App. 538, 549-550, 195 Pac. 958, is a case in point. There the corporation was held liable as a joint participant, but the acts of the employees were active acts of negligence which the court found were directed by the corporate employer.

Similarly, in *Benson v. Southern Pacific,* 177 Cal. 777, 171 Pac. 948, the tort resulted from active negligence—the operation of the train at an excessive rate of speed—and the court held that the evidence showed that it was being operated "at a rate of speed predetermined by the defendant corporation."

The case of *McCullough v. Langer,* 23 Cal. App. 2d 510, 73 P. 2d 649, cited by Appellee, involved an individual employer, a doctor, and his employee, a nurse. The physician employer was held as a joint participant because, as the court states, at page 517:

> "Under the circumstances of this case, the nurse was presumed to attend the patient *under the super-*

vision and direction of her employer, Dr. Langer." (Emphasis added.)

Furthermore, Dr. Langer was actually a joint participant in the negligence in that he himself directed the nurse to leave on the lamp that caused the burn. (P. 514 of opinion.)

In the case of *Newman v. Fox West Coast Theatres,* 86 Cal. App. 2d 428, 194 P. 2d 706, the court held the evidence was such that the jury could have found that the failure of the corporation to have sufficient personnel present to maintain the theatre could have been the proximate cause of the accident, rather than any act or omission on the part of the theatre manager. In such a case, the negligence would be that of the corporation itself, rather than that of its manager, and the corporation would be liable as the tort feasor. There is no such evidence in the instant case.

In spite of Appellee's argument, it seems clear on the authority of the cases of *Bradley v. Rosenthal, supra,* through the *McInerney* and *McCullough* cases, that only where the employee is acting under and pursuant to the direction of his employer will the employer be deemed to be a joint participant in the tort.

It is also clear that in the case at bar, the supervisory employees of the Neil Company who were found by the trial court to be negligent, were, at the most, negligent in *failing* to act—in failing to stop the back-filling.

VII.

The Neil Company Did Not Have Control of the Premises.

The Appellee relies upon the interpretation of "control" testified to by their expert, Mr. Payson. He based his interpretation upon his interviews with contractors, but then went on to say that "it is rather unusual that the contractor comes in to discuss this point with us" [R. p. 423] and actually he had discussed the point only once with one contractor some six years ago. [R. p. 423.]

Appellee cites *Langaza v. San Joaquin L. & P. Corp.*, 32 Cal. App. 2d 678, 90 P. 2d 825, to the effect that "right to use the land remains in the owner of the fee so far as such right is consistent with the purpose and character of the easement." The quotation which is taken from 17 Am. Jur. 993, goes on to state:

> "The right of the easement owner and the right of the landowner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both. It has been held that the rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil."

Here, the owner has granted an easement to California Electric Power Co. and has entered into a construction contract involving the same premises with the Neil Company. It is proper for the owner to permit its remaining rights in the property to be exercised by a third person, but neither the third person nor the easement owner has control but their rights are governed by prin-

ciples permitting an equitable adjustment of the conflicting interests. (*Pasadena v. California Michigan, etc. Co.*, 17 Cal. 2d 576, 583.)

In *Louthan v. Hewes,* 138 Cal. 116, 70 Pac. 1065, the contractor had control in the sense that he was a contractor rather than an employee and therefore not subject to the control and direction of the owner.

The instant case involves a situation where there are two independent contractors—the Neil Company and the California Electric Power Co.—and so long as the latter exercises dominion over the premises for purposes granted it by the owner, it cannot be said that the Neil Company has control over such premises.

Respectfully submitted,

Moss, Lyon & Dunn,

By George C. Lyon,

Attorneys for Appellant.

No. 14254.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,
Appellant,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation,
Appellee.

PETITION FOR REHEARING AND STAY OF MANDATE.

JAMES V. BREWER,
548 South Spring Street,
Los Angeles 13, California,
Attorney for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

No. 14254.

IN THE

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PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,

Appellant,

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HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation,

Appellee.

PETITION FOR REHEARING AND STAY OF MANDATE.

COMES NOW the Appellee, Hartford Accident & Indemnity Company, a corporation, and respectfully requests a rehearing of the above entitled matter upon the following grounds:

This case was brought in the Federal Court because of the diversity of the citizenship of the parties involved and thus, the District Court was given jurisdiction and at the same time is bound to follow the decisions and laws of the state where the action arose, to wit: California, under the United States Supreme Court decision of *Erie v. Tompkins,* 304 U. S. 64. This present decision, we

respectfully urge, overrules much settled law and many decisions of the California courts.

Certain phases of the decision are sufficient to require rehearing and would change the decision to affirmance of the lower court and it does not seem expedient to cite the multitude of decisions involved, as we believe the principles are well established under California law and decisions.

The main points of this decision which we respectfully urge are entirely contrary to California law and which are decisive in this case are conclusions:

(1) That Neil Co. is not a joint tort-feasor with its employees—the driver and flagman of the truck. (The Supreme Court of California holds differently in many cases as set forth on page 20 of Appellee's brief—*McInerney v. The United Railroads,* 50 Cal. App. 538, 195 Pac. 958, and *Benson v. Southern Pacific,* 177 Cal. 777, 171 Pac. 948.)

(2) That in a suit between Neil Co. as a plaintiff (or Pacific Employers Insurance Company under its subrogation) against the driver and flagman, because of loss due to their negligence, said employees could not urge that Neil Co. was contributorily negligent in its operation in respect to the unloading of the truck in question because the Neil Co. would not be responsible for its supervisorial employee's negligence, excepting under the doctrine of *respondeat superior* (in other words, in all cases where the employer subrogates against a negligent employee the defense of contributory negligence, arising upon negli-

gence of other employees, is wiped out unless it was an act directed by the officers of the company or principal expressly.

(3) That even though the California Statute of Limitations for torts had passed on January 27, 1952, and the California Statute of Limitations for implied contracts had passed on January 27, 1953 (Op. p. 13) and Findings and Judgments were signed January 5, 1954, and no action had been started by Pacific Employers Insurance Company or Neil Company, at the latter date, still such said California Statutes for decisions have no effect, but a decision from Ohio is binding. (The law of California in the case of *Automobile Insurance Company of Hartford, Conn. v. Union Oil Company,* 85 Cal. App. 2d 302, is applicable and not the law of Ohio as stated in the opinion on page 13.)

(4) That even though three decisions of the California Appellate Court and approved by its Supreme Court, that the law of primary and secondary insurance does not apply in California and in the latest decision of *Traders General Insurance Company v. Pacific Employers Insurance Company,* 130 Cal. App. 2d 158, holds the same and a petition for hearing in that case was denied by the State Supreme Court, this Court does not have to follow same. (The *Traders'* case was decided after the *United Pacific, Canadian Indemnity Company* and *Maryland Casualty Company* cases, thus, showing California courts intent to maintain their own sovereign law.)

(5) It is further urged that the Trial Courts' findings of fact were substantially supported by evidence as to the Neil Co. being liable not solely on the doctrine of *respondeat superior,* and thus, this Honorable Appellate Court is required to follow the factual findings and draw every favorable inference in favor of appellee. (*Hunter v. Shell Oil Co.,* 198 F. 2d 485; *Insurance Co. of North America v. Board of Education of Independent School District No. 12,* 196 F. 2d 901.)

Wherefore, Appellee respectfully prays that this Honorble Court rehear the matter and that a mandate of the Court be ordered stayed until the final determination of this rehearing.

Respectfully submitted,

James V. Brewer,

Attorney for Appellee.

Certificate of James V. Brewer.

State of California, County of Los Angeles—ss.

Comes now, James V. Brewer, being first duly sworn, deposes and says:

That he is the attorney for the appellee in the above entitled action and that in affiant's judgment the Petition for Rehearing is well founded and is not interposed for the purpose of delay.

JAMES V. BREWER.

Subscribed and sworn to before me this 14th day of December, 1955.

ANN THOMAS,
Notary Public in and for said County and State.

No. 14304

United States Court of Appeals

for the Ninth Circuit

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-14-54

No. 14304

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BERNARD HENRY ASHAUER,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

MANLEY J. BOWLER,
Assistant U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 23002—CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD HENRY ASHAUER,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462, Universal Military Training and Service Act]

The grand jury charges:

Defendant Bernard Henry Ashauer, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 83, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on December

8, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ [Indistinguishable,]
Foreman.

/s/ WALTER S. BINNS,
United States Attorney.

ADM:AH

[Endorsed]: Filed July 22, 1953. [2*]

[Title of District Court and Cause.]

WAIVER OF JURY

The above-entitled cause coming on regularly for trial, defendant being present with counsel, J. B. Tietz, Esq., and the defendant being desirous of having the case tried before the Court without a jury, now requests of the Court that the case be so tried and hereby consents that the Court shall sit without a jury and hear and determine the charges against the defendant without a jury. The defendant also waives any special finding of facts by the Court.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Dated: 8/25/53.

/s/ BERNARD H. ASHAUER,
Defendant in Pro Per.

I have advised the defendant fully as to his rights and assure the Court that his request for a trial without a jury and waiver of special findings is understandingly made.

Dated: 8/25/53.

/s/ J. B. TIETZ,
Attorney for Defendant.

The United States Attorney hereby waives any special finding of facts and consents that the request of the defendant be granted and that the trial proceed without a jury.

Dated: 8/25/53.

/s/ LAUGHLIN WATERS,
U. S. Attorney,

By /s/ EDWARD J. SKELLY,
Assistant U. S. Attorney.

Approved:

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed September 23, 1953. [4]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and Bernard Henry Ashauer, Defendant, in the above-entitled matter, through their respective counsel, as follows:

That it be deemed that the Clerk of Local Board No. 83 was called, sworn and testified that:

1. She is a clerk employed by the Selective Service System of the United States Government.

2. The defendant, Bernard Henry Ashauer, is a registrant of Local Board No. 83.

3. As Clerk of Local Board No. 83, she is legal custodian of the original Selective Service file of Bernard Henry Ashauer.

4. The Selective Service file of Bernard Henry Ashauer is a record kept in the normal course of business by Local Board No. 83, and it is the normal course of Local Board No. 83's business to keep such records. [5]

It Is Further Stipulated that a photostatic copy of the original Selective Service file of Bernard Henry Ashauer, marked "Government's Exhibit 1" for identification, is a true and accurate copy of the contents of the original Selective Service file on Bernard Henry Ashauer.

It Is Further Stipulated that a photostatic copy

of the Selective Service file of Bernard Henry Ashauer, marked "Government's Exhibit 1" for identification, may be introduced in evidence in lieu of the original Selective Service file of Bernard Henry Ashauer.

Dated this 22nd day of September, 1953.

LAUGHLIN E. WATERS,
United States Attorney;

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division;

/s/ EDWARD J. SKELLY,
Assistant U. S. Attorney,

Attorneys for Plaintiff.

/s/ J. B. TIETZ,

Attorney for Defendant.

/s/ BERNARD H. ASHAUER,
Defendant.

ORDER

It Is So Ordered this 23rd day of September, 1953.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed September 23, 1953. [6]

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 26, 1953

Present: The Hon. Harry C. Westover,
District Judge.

Defendant present on bond.

Proceedings: For further trial (ruling on motion for acquttal and/or decision.

It Is Ordered that the motion for acquittal is denied.

It Is Ordered that the cause is continued to November 3, 1953, at 10:00 a.m. for further trial.

EDMUND L. SMITH,
Clerk.

By E. M. ENSTROM, JR.,
Deputy Clerk. [7]

[Title of District Court and Cause.]

MINUTES OF THE COURT—NOV. 3, 1953

Present: The Hon. Harry C. Westover,
District Judge.

Defendant present on bond.

Proceedings: For further trial.

Court orders cause continued to 2 p.m.

At 2 p.m. Court reconvenes herein, and case is reopened.

Bernard Henry Ashauer is called, sworn, and testifies in his own behalf. Defendant rests.

Attorney Tietz, for defendant, renews motion for judgment of acquittal.

Court Orders said motion Denied.

It Is Ordered that cause is continued to Nov. 4, 1953, 10 a.m., for further trial.

EDMUND L. SMITH,
Clerk,

By E. M. ENSTROM, JR.,
Deputy Clerk. [8]

United States District Court for the Southern District of California, Central Division

No. 23,002—Criminal

UNITED STATES OF AMERICA,

vs.

BERNARD HENRY ASHAUER.

JUDGMENT AND COMMITMENT

On this 5th day of November, 1953, came the attorney for the government and the defendant appeared in person and by counsel, J. B. Tietz, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty of the offense of unlawfully failing on Dec. 8, 1952, in Los Angeles County, Calif., to be inducted into the armed forces of the United States as so notified and ordered to do, in violation of

U.S.C., Title 50, App., Sec. 462, Universal Military Training and Service Act, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years.

It Is Adjudged that execution of sentence is stayed and defendant is allowed to remain on bond pending filing of notice of appeal and application for bail pending appeal; said stay of execution, however, is not to extend beyond Nov. 23, 1953.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
United States District Judge.

The Court recommends commitment to Federal Road Camp, Tucson, Ariz.

[Endorsed]: Filed November 5, 1953. [10]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Bernard Henry Ashauer, resides at 5259 Sepulveda Boulevard, Van Nuys, California.

Appellant's Attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App., Sec. 462, Selective Service Act, 1948, as amended.

On November 5, 1953, after a verdict of Guilty, the Court sentenced the appellant to three years' confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed November 9, 1953. [11]

[Title of District Court and Cause.]

EXTENSION OF TIME TO DOCKET RECORD

For good cause shown defendant-appellant is hereby given 50 additional days, to and including February 14, 1954, to prepare and docket the record on appeal.

Dated: December 18, 1953.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed December 18, 1953. [12]

[Title of District Court and Cause.]

EXTENSION OF TIME TO DOCKET RECORD

For good cause shown defendant-appellant is hereby given 50 additional days, to and including April 5, 1954, to prepare and docket the record on appeal.

Dated: February 9, 1954.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed February 9, 1954. [13]

In the United States District Court, Southern District of California, Central Division

No. 23002—Crim.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BERNARD HENRY ASHAUER,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

September 23, 1953

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,
United States Attorney; by

EDWARD SKELLY,
Assistant United States Attorney.

For the Defendant:

J. B. TIETZ, ESQ.,
257 South Spring Street,
Los Angeles, California.

September 23, 1953, 10:00 A.M.

The Clerk: No. 23002, United States vs. Bernard Henry Ashauer.

Mr. Skelly: Ready for the government.

Mr. Tietz: Ready for the defendant.

The Court: You may proceed.

Mr. Skelly: Your Honor, the government requests the court to permit the government to mark Selective Service file of Bernard Henry Ashauer for identification.

The Court: It may be marked as Government's Exhibit No. 1 for identification.

The Clerk: Plaintiff's Exhibit No. 1 for identification, your Honor.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Mr. Skelly: The government and the defendant, Bernard Henry Ashauer, through his counsel, have entered into the following stipulation:

It is hereby stipulated and agreed by and between the United States of America, plaintiff, and Bernard Henry Ashauer, defendant, in the above-entitled matter, through their respective counsel, as follows:

That it be deemed that the clerk of Local [3*] Board No. 83 was called, sworn and testified that:

1. She is a clerk employed by the Selective Service System of the United States Government.

2. The defendant, Bernard Henry Ashauer, is a registrant of Local Board No. 83.

3. As clerk of Local Board No. 83, she is legal custodian of the original Selective Service file of Bernard Henry Ashauer.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

4. The Selective Service file of Bernard Henry Ashauer is a record kept in the normal course of business by Local Board No. 83, and it is the normal course of Local Board No. 83's business to keep such records.

It is further stipulated that a photostatic copy of the original Selective Service file of Bernard Henry Ashauer, marked Government's Exhibit 1 for identification, is a true and accurate copy of the contents of the original Selective Service file on Bernard Henry Ashauer.

It is further stipulated that a photostatic copy of the Selective Service file of Bernard Henry Ashauer, marked Government's Exhibit 1 for identification, may be introduced in evidence in lieu of the original Selective Service file of [4] Bernard Henry Ashauer.

Dated this 22nd day of September, 1953.

We move, your Honor, to have the court accept this stipulation.

The Court: The stipulation may be filed.

Mr. Skelly: We further move to have Government's Exhibit 1 for identification received in evidence.

The Court: It may be marked in evidence.

The Clerk: So marked, your Honor.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 1.)

Mr. Skelly: The government rests, your Honor.

Mr. Tietz: Your Honor, Mr. Skelly, the govern-

ment, having rested, the defendant moves for a judgment of acquittal on the ground that the evidence introduced by the government, the Selective Service exhibit, shows a number of denials of due process of law, and these denials the defendant wishes to bring to the court's attention.

The defendant claims that each of them invalidates the order to report, and being a void order, he is not required to obey it.

The Court: If you can show me where any such denial is, I will grant your motion. You show me in the record where there has been a denial of due process.

Mr. Tietz: I will have five denials to argue to your [5] Honor. I will state them so that your Honor will have in mind what I am aiming at generally, as well as specifically, and so the government can follow, also. Each one of them, I would like to present the portion of the evidence that supports the point, and I would like to present the cases that support my argument.

The first is that the record, the exhibit, shows indisputably that in the personal appearance hearing, a prejudiced attitude was exhibited against this registrant, prejudiced to such a degree that there should be no question but that they did not have the proper semi-judicial attitude that a local board must have in judging a man.

The Court: May I ask you a question? Inasmuch as you represent a number of these defendants and inasmuch as, possibly, the arguments will

follow the same line, do you contend that this was a personal prejudice?

Mr. Tietz: Yes, sir.

The Court: Or was it a prejudice because he claimed to be a conscientious objector? Was it a personal prejudice against the individual?

Mr. Tietz: I am only speculating on that, but I would say from the words used, "You are yellow, that is why you want this deferment, you are yellow," that that is personal.

The Court: Is it because he is claiming to be a conscientious objector? [6]

Mr. Tietz: Yes. So to that extent it may be it was a class hatred or group hatred exhibited by that statement.

The Court: May I ask you another question? Are these people you represent a member of any particular sect or religious group?

Mr. Tietz: Yes.

The Court: What is it?

Mr. Tietz: This defendant is a member of Jehovah's Witness.

The Court: Is it your point of view on this prejudice that when a Jehovah's Witness asks to be classified as a conscientious objector and it is denied, that that is a prejudice? Is that your theory?

Mr. Tietz: Not in this case. There have been cases, although I don't think there will be one of them in the seven or eight or nine, whatever it is, in this group that are to be tried more or less consecutively, I don't think I have the good fortune

to be able to demonstrate that that is true here. It so happens in this particular case that I can point to the page and line in a few moments where that prejudice is shown toward this defendant.

The Court: Let me have your other points.

Mr. Tietz: The next point is that at the personal appearance hearing he was denied permission to introduce new evidence to the extent that he wanted to, which was a reasonable [7] extent. I will show the facts on that and I will give some cases, one recent appellate decision, not yet in the advance sheets even, although I think counsel will stipulate that the copy I have is correct.

The Court: Let's have the evidence and then we will go into the cases.

Mr. Tietz: I thought I would first run over these points and then I will go back over each one individually.

The Court: All right.

Mr. Tietz: My next ground for a motion is that he was reclassified to 1-A on November 20, 1951, from the 4-E classification in which he had been on January 16, 1951, without any new evidence appearing in the file, so that they had no jurisdiction to act. It was obviously whimsical.

The next point I wish to make——

The Court: Just a minute. I want to ask you a question, Mr. Tietz.

Mr. Tietz: Yes.

The Court: You mean to say you believe if the board classifies a registrant today, that that classi-

fication must stand forever, that it cannot be changed?

Mr. Tietz: No, the regulations specifically say no classification is permanent. That is the only regulation that is that short.

The Court: Does the regulation say you can't change a [8] classification without receiving any evidence?

Mr. Tietz: There is no regulation that puts it in those words, but there are regulations, and there are many court decisions that say this. The registrant must within 10 days after any change of circumstances, he moves, his employment—let us say that I should say that, because it isn't important in our discussions whether he moved or hadn't, but if he changes his type of employment, if he changes his marital status, if he is a father and his child dies so he no longer enjoys the fatherhood deferment, he must tell the board.

The Court: That must become of record.

Mr. Tietz: Yes, sir. The classification, new classification can be made only on the written record. If the board learns of anything orally, they must reduce it to writing and place it in the files. Those are the regulations.

The Court: If I understand your point correctly, he was classified 4-E.

Mr. Tietz: Yes, sir.

The Court: Without any new evidence before the board or without anything in the record they arbitrarily changed it to 1-A, is that right?

Mr. Tietz: Yes, sir.

The Court: All right. Let's go to the other point.

Mr. Tietz: I am basing that point more on that they had no jurisdiction than I am on the arbitrariness, although that [9] enters into it, because my fifth point is going to be arbitrariness to cover the over-all situation, which is a separate point altogether.

The Court: What is No. 4?

Mr. Tietz: No. 4 is that both the hearing officer in his advisory opinion to the Attorney-General, and the Attorney-General in his recommendation to the appeal board based their opinions and their recommendations on an illegal basis. I will point out precisely what the illegal basis is and I will argue it. Although your Honor may not agree with me, the Department of Justice, surprisingly enough, has come around to my point of view. At that time they had a different opinion. I will also argue when I come to that point in argument that I do not have to show that the appeal board relied on that. All I have to show is that that was placed before them, and then it is up to the government, if it can, to show that it did not rely on it. I will come to that a little later.

My fifth point is that the evidence in this file shows that the 1-A classification was arbitrary, and that will require quite a bit of argument and quite a bit of citation from the authorities, because this point is a more difficult point to persuade a district court on than any of the others. You might say it is taking it the hard way. I think there are a dozen and a half important decisions solely on that point,

where the district court has come out and said, [10] "Much as I dislike to say it, the administrative agency acted arbitrarily, the file shows nothing else but that; therefore I grant the motion for acquttal," or in some cases the Court of Appeals has reversed them.

Now, your Honor, I will proceed to the argument on this point.

(Argument.)

The Court: I will take the motion under submission. We will recess now until 2:00 o'clock, but we will proceed with the other case.

Mr. Tietz: We haven't rested.

The Court: You have made a motion.

Mr. Tietz: Yes, on the government's evidence.

The Court: On the government's evidence, yes. If I grant your motion, you don't have to go further.

Mr. Tietz: But if the court doesn't——

The Court: If the court doesn't grant the motion, he will give you opportunity to present any evidence you have, but I want to proceed this afternoon with the other case. I will take your motion in this case under submission so I will have a chance to read these decisions.

Mr. Skelly: Will this case 23002 be continued to a later date, if your Honor is going to hear the other one?

The Court: If I don't grant the motion of the defendant, the case will be continued to a later date for further [11] testimony. All I have before me is the government's case. The government has

no more evidence. If I determine that there has been an abuse of due process, if that abuse hasn't been cured by the appeal board, then I will have to grant the defendant's motion. If I find there has been no abuse of due process, or if there was an abuse, it was cured, then I will deny the motion and we will proceed to hear the testimony.

Court will now stand in recess.

(Thereupon an adjournment was taken sine die.) [12]

October 26, 1953, 2:00 P.M.

The Clerk: No. 38, 23002, United States vs. Bernard Henry Ashauer, further trial.

Mr. Skelly: Ready.

Mr. Tietz: Ready for the defendant and the defendant is present.

The Court: Now, Mr. Tietz, what is the problem here?

Mr. Tietz: If the court agrees with me that there were some apparent denials of due process, then we have no further problem.

The Court: What is the denial?

Mr. Tietz: There were five I brought to the attention of the court in my argument. Arbitrariness——

The Court: Arbitrariness of whom?

Mr. Tietz: Everybody.

The Court: Of the appeal board?

Mr. Tietz: Whenever everybody overlooks the facts, then they are all arbitrary, your Honor.

The Court: Even the court?

Mr. Tietz: Most assuredly. I would use a different word. The court then is using judicial discretion. There is the same illegal basis, because he believed in self-defense. The hearing officer and the Attorney-General thought they couldn't help him, but the main thing that interested the court was my [13] point three, and that is that they reclassified him, the local board, from the complete conscientious objector classification which he received January 16, 1951, on November 20, 1951, with no new evidence placed in the file to show that they had jurisdiction to do so.

(Further argument.)

The Court: It is my opinion when the board makes a classification, it is not estopped from reconsidering that classification, that it can reconsider the facts before it and come to a different conclusion. Consequently, I will deny the motion for an acquittal.

Mr. Tietz: Before your Honor speaks further on this point, let me recall to your Honor we are not through with the case. We merely heard the government's testimony.

The Court: Have you got any testimony?

Mr. Tietz: Oh, yes, and I have got some more points to bring up.

The Court: We will set the matter down for further trial next Tuesday, a week from tomorrow.

Mr. Tietz: At 2:00 o'clock?

The Court: At 10:00 o'clock in the morning.

(Whereupon, an adjournment was taken to November 3, 1953, at 10:00 o'clock a.m.) [14]

November 3, 1953, 2:00 P.M.

The Clerk: No. 8, 23002, United States vs. Bernard Henry Ashauer.

Mr. Mitsumori: Ready for the government.

Mr. Tietz: Ready for the defendant. The defendant is present in court.

Mr. Mitsumori: I understand, your Honor, this is a continuation from last week.

The Court: My understanding is that the government has presented its testimony and rested. The defendant has made a motion.

Mr. Mitsumori: Yes.

The Court: Mr. Tietz indicated they had other evidence they wanted to introduce.

Mr. Tietz: Yes, your Honor. In connection with the motion, I do not recall what disposition your Honor made. I think your Honor took it under submission and was reserving decision until the end of our case and your Honor then might possibly pass favorably on one of the five points I brought up in the first motion, because my second motion will have five new and different points.

Mr. Mitsumori: I understand, your Honor, the motion had been acted upon and denied.

The Court: Mr. Tietz, you ought to save some points for [16] another case. You know, you oughtn't to give all your points in one case.

The Court: Sometimes when the boards go

wrong, as in this case, they go very wrong, so there are ten points.

The Court: Let's start out and dispose of your points.

Mr. Tietz: Will you take the stand, please, Mr. Ashauer.

BERNARD HENRY ASHAUER

called as a witness herein by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. Will you state your name?

The Witness: Bernard Henry Ashauer.

Direct Examination

By Mr. Tietz:

Q. You are the defendant in this case, are you not? A. That's right.

Q. In November of 1951 you received a 1-A classification notice from the local board, did you not? A. That's right.

Q. That was after you had had a 4-E classification for perhaps 11 months or a year?

A. That's right.

Q. Did you have a personal appearance before the local [17] board? A. Yes, I did.

Q. Why did you ask for that hearing?

A. I asked for that hearing because I wanted to know why I had a 4-E for a whole year and all of a sudden they would change it to a 1-A.

(Testimony of Bernard Henry Ashauer.)

Q. When you came to the hearing, did you put that question to the local board members there?

A. Yes, I did.

Q. How many local board members were there?

A. There were three, and one girl taking notes.

Q. The girl was the clerk of the board, was she not? A. Yes, I think so.

Q. Did you attempt to discuss this situation of your Selective Service file with these three board members? A. Yes, I did.

Q. What happened when you attempted to discuss your file and the classification situation?

A. Well, actually, they didn't answer my questions very well.

Q. What do you mean by "your questions"? What question did you ask them?

A. Like I asked them why I was 4-E and then they made me 4-A. I could never get a—how would I say it, an answer, why they did that. [18]

Q. What did they say when you asked them?

A. One person popped up and said, "I guess I got three boys over there and you should be there, too," and made other statements, and one pointed over there and said, "You are just plain yellow for not going in."

Q. Tell me this, in discussing the file, that is, in discussing your file, tell me this, did you try to discuss the contents of your file with them and point out certain things to them?

A. Yes, I did.

Q. Did they let you do it?

(Testimony of Bernard Henry Ashauer.)

A. No, they didn't.

Q. In what way wouldn't they let you do it?

A. Well, every time I would have a point or something and would try to talk to them, they always had something else to say, and they would never—how would I say—stick to the point. If I would ask them a question or something, they would always go around to something else and I could never get a direct answer from them.

Q. Then you mean you did not get to discuss the facts in the file with them?

A. That's right.

Q. Did you try to point out to them that the views that you had with respect to conscientious objection at the time of your personal appearance were the same as the views that you [19] had when they gave you a 4-E classification?

A. That is true.

Q. When you tried to do that, what happened?

A. Well, again, like I said, they misinterpreted what I tried to say. When I tried to use the Bible, they wouldn't let me use the Bible for my defense, because they said it could be interpreted any old way.

Q. At this hearing, did you try to present any evidence before them? A. Yes, I did.

Q. In what way did you try to present any evidence

A. I had some booklets, as I can recall the names, God and the State, and Neutrality, and one other, I believe, is called Loyalty. Well, all these

(Testimony of Bernard Henry Ashauer.)
booklets were—how would I say?—all the writings in these booklets were the same thing as I would try to say to them if they would give me a chance to.

Q. You mean these booklets express your own views? A. That's right.

Q. Was there anything in these booklets that was new or different than what you had already given them? A. Yes, it would be.

Q. What happened when you tried to give these booklets to them?

A. They said it would make the file too full and they [20] couldn't accept them.

Q. Did they accept them?

A. No, they did not.

Q. Did they accept any papers at all from you?

A. Yes, they did. I had some affidavits.

Q. Under what circumstances did they accept those papers?

A. They took them because they said they weren't bulky to handle and they would fit in the file nice.

Q. Did they take them the first time you offered them? A. No.

Q. How did they happen to take them?

A. I told them according to the law, as I thought, they should take them and that I was going to write to Brother Covington about them.

Q. Who is Brother Covington?

A. He is a lawyer for the Society.

Q. You mean W. C. Hayden, of the Watchtower Society in Brooklyn? A. Yes.

(Testimony of Bernard Henry Ashauer.)

Q. Did you say anything to them about 4-E and 1-O being the same classification?

A. Yes, I did, but when I told them I thought the 4-E should be the same as a 1-O, they didn't know what that was.

Q. Do you mean they didn't know what it [21] was?

A. They had their records before them and when I—well, when I told them about that 1-O, they didn't know what it was and they didn't know what that particular classification was at that time, so they had their little book at that time and they had to look it up, and by that time somebody else had something else to say and they didn't go back to the point.

Q. Did you say anything about taking a 1-O classification?

A. Yes, I did. I said I would be willing to accept that.

Q. In connection with trying to give them any evidence you mentioned something before about trying to use your Bible. What happened in connection with that?

A. Well, as this was my only defense, I tried to use the Bible, and they said it can be interpreted any old way, so we don't want to hear it.

Q. Were you wanting to use the Bible to explain the religious basis for your conscientious objection to participation in war?

A. That's right.

(Testimony of Bernard Henry Ashauer.)

Q. They said they didn't want to hear it, is that it? A. That is correct.

Q. You mentioned something before about the attitude of these board members, something about yellow. Tell us what happened in connection with that. [22]

A. As we were talking, they asked me why I didn't want to go in, and I told them because of my beliefs. One board member just pointed over to the desk and said, "You are just plain yellow, that is why you don't want to go in."

Q. What do you mean by he pointed to the desk?

A. I was sitting there and he reached over and pointed his finger at me.

Q. He reached over the table and pointed his finger at you?

A. He reached over the table and pointed his finger at me and said, "You are plain yellow."

Q. Did anybody apologize for his statement?

A. No, they didn't.

Q. You had a hearing before a hearing officer, didn't you, for the Department of Justice?

A. That is correct.

Q. At that hearing, did he tell you what information they had that the FBI had dug up against you? A. Yes, he did.

Q. What were the circumstances?

A. He said that there were two people, I think, that says, "If provoked to anger, would kill," but he could not give out the names.

Q. So you didn't get the names and addresses?

(Testimony of Bernard Henry Ashauer.)

A. No, I didn't. [23]

Q. Did he say he would not give you the names and addresses?

A. That's right. When I first walked in, he said, "I can tell you your record is all pretty good except those two. I can't give you the names and addresses to that particular extent."

Mr. Tietz: You may cross-examine.

Cross-Examination

By Mr. Mitsumori:

Q. Mr. Ashauer, when you appeared before the board for your personal appearance, didn't the board members give you an opportunity to describe to them the basis of your belief for the classification you desired?

A. When I first went in there, they asked me, and that is what I told them. Like I said, it was my hearing, and I asked them why I was 4-E for a while and then they made me 1-A.

Q. Did they give you an opportunity to expound your views?

A. Yes, to a certain extent they did.

Q. To what extent?

A. Well, like I asked them why, and then they started talking about all this kind of thing. [24]

Q. Did you get an opportunity to express your views on why you felt you should be entitled to 1-O or 4-E classification?

A. Well, when I first came in, I told them I

(Testimony of Bernard Henry Ashauer.)

was entitled to 1-O, and for a few minutes they did listen.

Q. Did you state the basis for your belief?

A. Yes, I did, that I was raised from childhood on.

Q. As a what?

A. As a Jehovah's Witness.

Q. Did you tell them that your father and mother were both Jehovah's Witnesses?

A. Yes, I did.

Q. And that you had been brought up in that sect by your parents? A. That is correct.

Q. Did you bring the Bible with you?

A. Yes, I did.

Q. Did you quote from any portion of the Bible?

A. No, sir, because they wouldn't let me do so.

Q. Did you use any expressions that are found in the Bible as the basis for your belief?

A. Well, like I said, at my hearing I didn't have much to say because every time I would say something, they would bring up other points.

Q. What other points would they bring up? [25]

A. Well, when I tried to explain to them from the Bible I believed this world was under a system of the devil, because it wouldn't be under God, He wouldn't permit wars; things like that, before I could say anything, one person said, "Why don't you tell Truman he is a devil?" I mean speaking like that. I would try to say something and they would more or less misinterpret what I said.

Q. Isn't it a fact that you made a statement to

(Testimony of Bernard Henry Ashauer.)

the board to the effect that the Bible states, "Thou shalt not kill," and that is the basis of your objection? A. That's right.

Q. And you had an opportunity to make that statement, did you not? A. Yes.

Q. Isn't it a fact that that is one of the bases for your objection to the 1-A classification?

A. That is correct.

Q. That is the teaching in the Bible, that "Thou shalt not kill"? A. That is correct.

Q. Isn't it a fact that at that hearing you had an opportunity to present additional evidence?

A. All I could present was three pieces of paper that, you know, that people would write concerning my behavior in my company, and so forth, and that's all they would take. [26]

Q. Weren't there four letters, one from Mr. Floyd Kite, Jr.? A. Yes.

Q. And also one by Mr. Norman Walter?

A. Yes, there is one from him.

Q. And also one by Vernon C. Kern?

A. Yes.

Q. You also presented, I believe, a letter or a copy of a letter signed by C. B. Cates?

A. Yes.

Q. General, U. S. Marine Corps?

A. That is correct.

Q. You had an opportunity to present each of those documents?

A. Yes, at that particular time. I can't remember, like I say, how many there were. I thought

(Testimony of Bernard Henry Ashauer.)

there were three but actually those are all in there.

Q. You presented those letters as part of your evidence to sustain your 1-O classification?

A. That is correct.

Q. You did that?

A. That's right, and my background, and so forth, like that.

Q. How long would you say that the hearing took place? A. 15 minutes. [27]

Q. Did you have everything you wanted to say at that time?

A. To an extent, yes, because, like I say, I could talk only on certain points. If I would try to present something on my belief, they would come up with other things that weren't in the case.

Q. Those other things, would they have been questions related to what you had stated to them?

A. As I can remember, I would be talking and one would say, "Well, this is right, this is the organization that doesn't want to salute the Flag," and like that. They always went off on different points, not the point why I was a 4-E once and then I was made a 1-A.

Q. At the time of the hearing, were you employed, Mr. Ashauer? A. Yes.

Q. Where were you employed?

A. I believe I was employed as a mechanic helper. It is on Burbank Boulevard, in North Hollywood.

Q. Were you about that same period of time not employed by General Motors?

(Testimony of Bernard Henry Ashauer.)

A. That is correct.

Q. Chevrolet Division of General Motors?

A. That's right; when I first got out of school, I worked there. [28]

Q. If I might refresh your recollection, at the time you submitted your questionnaire to the draft board, were you not employed at the General Motors? A. That's right, I think so.

Q. Mr. Ashauer, I have got this photostatic copy of your file. Let me show you pages 20 and 21. This appears to be a pamphlet of the Jehovah Witness sect, is that correct? A. That is correct.

Q. On page 21, here is another pamphlet, known as the Watchtower. A. That's right.

Q. Were these offered by you to the draft board at the time of the hearing, as near as you can recall? A. Yes, I think so.

Q. In other words, you presented these to the draft board at the time of your personal appearance here? A. Well——

Mr. Tietz: Let him examine the file.

The Witness: Well, I believe I did present some things. I don't know when these were, but they did accept these two.

Mr. Mitsumori: They did accept them?

Mr. Tietz: Suppose you examine it and see in what connection those two sheets may have been presented.

The Witness: Well, as I recollect now, they were willing to take this particular magazine, too, be-

(Testimony of Bernard Henry Ashauer.)

cause it is a thin [29] magazine and it doesn't take up too much space, and it is Why Jehovah's Witnesses are not Pacifists. They were willing to take this one here, because it is a small booklet. The others they refused to take because they took up too much space in the file.

Q. (By Mr. Mitsumori): How many pages were the other pamplets you had submitted?

A. Oh, maybe 30 pages in the book, just a small one, and the other might have been 18 or 20.

Q. Contrary to the statement you gave on direct examination, they did give you an opportunity to present these two pamphlets?

A. Well, after I told them that I was going to call up or I was going to write, and then when they heard that, they figured they'd better take some, so they did take some, those two pamphlets, or maybe three or four. I am not positive what it was.

Q. These pamphlets pretty well express the views of your body? A. No.

Q. The Watchtower——

A. The other two I had would have been better.

Q. They would have been better?

A. They would have given quotations from the Bible. I mean that is what they are actually for in case of a draft or [30] something, a person can take a look at the magazine to get a better understanding.

Q. Now, do you object to war in any form, participating in war in any form?

A. Yes, I do.

(Testimony of Bernard Henry Ashauer.)

Q. Would you participate in any warfare in which the Jehovah state might be involved?

A. Well, you could make all this a warfare, to try to say you win a case, or something like that, but actually not to go out and more or less kill anybody, no.

Q. In other words, if, for example, if I may put it this way to you, if Communists attempted to destroy Jehovah's Witnesses, would you take arms to combat them, to combat such a force as Communism, to preserve the state of Jehovah?

A. No, sir, I wouldn't. The only time you could do that would be, if you know the Bible back there in the time when the Israelites were the chosen people, they had a right to defend themselves because they were ruled by God, theocratic war.

Q. If God chose that Jehovah's Witnesses should participate in theocratic war, would you do so?

A. I don't know exactly, no, because I wouldn't know when there was——

Q. Assuming that he did, God did, command theocratic war?

A. I mean I don't understand what you mean there.

Q. I mean if in the event the Jehovah's people were [31] attacked, an evil force attempted to destroy Jehovah's people, would you, as a Jehovah's Witness, take arms to preserve your people and your belief that you do believe in?

A. Well, I would have to say no, because it was

(Testimony of Bernard Henry Ashauer.)

at the time during the last war, they were all in prison, too, under Hitler, and the people refused to take up arms, so, therefore, they were put into concentration camps.

Q. But during the last war Jehovah's people were not being attacked by Hitler.

A. Not necessarily like that, but it is like where all they had to do was sign a piece of paper saying he was the higher power and they refused to do that, because they know there is only one power.

Q. It is your belief you would not participate in any way, in any form, directly, or indirectly, is it not? A. That is correct.

Q. Even to the extent of participating in the war effort in a civilian capacity, working in defense industry?

A. That is true because I consider if you are working in a defense plant, you are making bullets, and so forth, provided for men to use, but I would be willing to do some other kind of work.

Q. Were you aware General Motors is one of the largest wartime contract holders?

A. Yes, sir, but when I was working there, we were [32] making cars for personal use for people. They were not making any kind of war material.

Mr. Mitsumori: No further questions.

(Testimony of Bernard Henry Ashauer.)

Redirect Examination

By Mr. Tietz:

Q. Mr. Mitsumori asked you about pages 20 and 21 of the exhibit. Did you notice whether or not pages 20 and 21 included all the material that you gave them in the two pamphlets called God and the State and the Watchtower of February 1, 1951?

A. No. This is just a cover of the book, and so is this.

Q. In other words, I understand by your answer that page 21 is merely a cover of that issue of the magazine? A. And so is this.

Q. And the last page? A. Correct.

Q. Page 25, if you will look at it, is the local board version of what took place at this personal appearance hearing of December 4, 1951, is it not?

A. Yes, it is.

Q. Mr. Mitsumori asked you whether or not it was correct that at this hearing you stated that the Bible says, "Thou shalt not kill." [33]

A. That is correct.

Q. Later on he asked you whether or not you objected to all kinds of participation in warfare?

A. That is correct.

Q. You said that was your position?

A. That is correct.

Q. In other words, your position is the 1-O position and not the 1-A-O position, is that correct?

A. That's right.

Q. Did you have a chance at this hearing to dis-

(Testimony of Bernard Henry Ashauer.)

cuss with them and explain the 1-O position that you took? A. This is before the——

Q. The local board? A. No, I didn't

Mr. Tietz: You may cross-examine further.

Mr. Mitsumori: I don't believe I have any further questions.

The Court: You may step down.

(Witness excused.)

Mr. Tietz: That, your Honor, is the defendant's case. I have no more testimony to offer.

At this time I wish to renew the motion that I made at the close of the government's case and to merely restate and not reargue the points I made then. [34]

First, that the file itself shows from the appeal statement made by the registrant that there was prejudice exhibited at the personal appearance hearing.

Second, his appeal statement shows that introduction of evidence at the personal appearance hearing was forbidden.

Three, that he was reclassified from class 4-E, which had been given him on January 16, 1951, to 1-A on November 20, 1951, without any new evidence to give the board jurisdiction.

The fourth point I made was that both the hearing officer in his advisory opinion and the Attorney-General in his recommendation to the appeal board based the opinion in the first instance on something else, and in the second instance on an illegal basis.

namely, that since he believed in self-defense, he couldn't qualify for a conscientious objector classification.

The fifth point I made was that the classification in 1-A, after he had been given a 4-E, was an arbitrary act, and the appeal board in sustaining that point committed an arbitrary act.

Now, with the court's permission, I wish to add a sixth point to that first group of points. It should properly have been made before. Somehow I overlooked it. I ask the court to consider this point, and that is that the file itself shows, and I could add that the testimony of the witness corroborates it, but it is not needed, the file itself is sufficiently [35] self-explanatory to show that these two pages, 20 to 21, are the only two documents that explain his position authoritatively, which he says is his position, and they refused them, they did accept two of them because they were thin ones, but they did not send them to the appeal board. They sent only the cover sheet of one and the cover sheet and back page of the other. I won't argue that point now, although it is a new one. I will argue it a little bit later in connection with the four additional points I wish to present which grow out of the defendant's testimony.

The Court: Let's dispose of the first group of points. Your motion is denied. Now you can go ahead and argue the other points.

Mr. Tietz: The first point is that at this personal appearance hearing they did not permit him to adequately and fully discuss the issues of the case.

The Court: Now, Mr. Tietz, there are cases which I have read which point out the fact that it is physically impossible for the local board to give to these people all the time that they think they are entitled to. There has to be some limitation.

Mr. Tietz: I agree.

The Court: Even in this court we don't give attorneys all the time they think they are entitled to to argue points of law. The fact of the matter is I can very easily say to you [36] now that I don't want to hear any more argument and cut you off.

Mr. Tietz: Your Honor would never do that.

The Court: I probably wouldn't, but I understand some of the judges do.

Mr. Tietz: Oh, I think it is error if it is done in that way and at that time. I think that counsel has a right to have a hearing from a court.

The Court: But suppose I say to you, "Mr. Tietz, you are just arguing and rearguing matters you have argued in other cases. I have held against you in other cases and I don't want to hear this argument any more."

Mr. Tietz: If I were trying to burden the court and belabor the same point, repeat myself, then I agree the court would be thoroughly right in saying, "I am sick and tired of hearing J. B. Tietz." Your Honor has never said it and I don't think he will. I hope you don't have to.

(Further argument of counsel.)

Mr. Tietz: My next point is that he presented them with two or three pamphlets and they utterly

refused to receive them, to consider them. My point is they can't do that. If he came to them with a truckload of material, they could say, "You are trying to swamp us and you are unreasonable," but when he comes to them with two or three pamphlets and says, "These explain my position," they should receive them.

The Court: You hold that argument until tomorrow morning [37] and we will find out from the clerk whether or not he did present any other pamphlets. All we have so far is his testimony.

Mr. Tietz: That's very good. Now, shall I continue with another point?

The Court: Yes.

Mr. Tietz: My other point is—I have two more points, but this is the next point—that when a Selective Service local board member says to a registrant, "I have three sons over there, there is no reason why you shouldn't be there," he is not exhibiting the judicial attitude that these men who are sitting as judges should exhibit, and then when another one leans over and points his finger at him and says, "You are yellow"—that may be disputed and now we have the opportunity to know, to have him here.

The Court: You may continue those arguments until we get the clerk here and we will have the version of the clerk. All we have got is the testimony of the defendant.

Mr. Tietz: That's all we have in our case. I did not keep them from bringing in the board members.

As a matter of fact, they called me up and said, "Won't you please stipulate and not cause the government the expense," and I say, "Sure, I will be accommodating."

The Court: They probably did not know how serious this was. [38]

Mr. Tietz: The last point I would like to present and to argue, and if the court would like a memorandum I would be happy to present one, is this. When the hearing officer at the start of the hearing lets him know that he will not be given the information that is necessary for a man to have to defend himself, the names of the people who said these things about him so that he can point out if it is true the man has a grudge against him or the man doesn't know him, he doesn't know who his accusers are, he is denied due process of law.

The Court: I think you have argued that before.

Mr. Tietz: That is by implication of the full FBI report.

The Court: I don't think that the defendant is entitled to see the report. He is entitled to, if he asks for it, to have a resume of the information.

Mr. Tietz: That is within the Nugent decision. What is a resume? If a resume doesn't give you who says the things, how can you meet it?

The Court: I don't know whether a resume goes that far.

Mr. Tietz: I am asking your Honor to decide, when they didn't let him know who said these bad things about him, he was not given a full resume.

The Court: I will rule against you on that. We

will continue this until tomorrow morning at 10:00 o'clock. [39]

November 4, 1953, 10:00 A. M.

The Clerk: No. 23002, United States vs. Bernard Henry Ashauer.

Mr. Tietz: Ready.

Mr. Mitsumori: Ready.

The Court: This other case will trail and we will proceed with the Ashauer case.

Mr. Mitsumori: I believe yesterday, your Honor, we concluded with my statement that I would have the original file, Selective Service file of the defendant, and also the clerk from that local board. I have Mrs. Lewis here.

Will you please come forward and take the stand, Mrs. Lewis?

MARY B. LEWIS

called as a witness herein by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please, and state your name?

The Witness: Mrs. Mary B. Lewis. [40]

Direct Examination

By Mr. Mitsumori:

Q. Mrs. Lewis, will you please state your occupation?

A. Well, I am clerk for Selective Service. I am

(Testimony of Mary B. Lewis.)

in charge of the Local Board 83 records in North Hollywood.

Q. What are your duties, what is the nature of your duties with Local Board 83?

A. Well, I have charge of all the girls that work in that office, I have to keep them trained.

Q. Do you have supervision and control of the files of all registrants with that Board?

A. All the registrants' files in that Board are under my jurisdiction, under my charge.

Q. Mrs. Lewis, you were requested by me to bring with you the original file, the registrant's file, Selective Service file, that is, of Bernard Henry Ashauer. Did you bring the original with you?

A. Yes.

Q. May I have it at this time?

A. Yes. (Handing file to Mr. Mitsumori.)

Mr. Mitsumori: I will ask the clerk at this time to mark the original Selective Service file of Bernard Henry Ashauer as Government's Exhibit 1-A.

The Court: It may be marked.

The Clerk: 1-A for identification, your [41] Honor.

(The file referred to was marked as Plaintiff's Exhibit No. 1-A for identification.)

Q. (By Mr. Mitsumori): I hand you at this time, Mrs. Lewis, the original file, Selective Service file of Bernard Henry Ashauer. Is that the original file kept in the custody of the local board which you represent of the registrant? A. Yes, it is.

Q. Mrs. Lewis, will you open up the file? I

(Testimony of Mary B. Lewis.)

will ask you at this time whether or not contained in the file there are two pamphlets, namely, the Watchtower, dated February 1, 1951, and also a pamphlet entitled God and the State? Are both such pamphlets contained there?

A. Yes, these pamphlets are both in the file.

The Court: Are they complete pamphlets?

The Witness: Yes, complete pamphlets.

The Court: Nothing has been deleted?

The Witness: No. They are all here.

The Court: All right.

Q. (By Mr. Mitsumori): Mrs. Lewis, I further ask you what is the procedure of the board, the practice of the board, when a registrant has appealed, the registrant's case has been appealed to the appeal board.

Mr. Tietz: Object, your Honor. What was done in this particular case is what we are concerned with. [42]

The Court: I don't think it is material what they usually do. It is what they have done in this particular case.

May I ask this witness a question?

Mr. Mitsumori: Yes. Go ahead.

The Court: Were you the clerk when the appeal was perfected in this particular case?

The Witness: I was not the clerk that did the work. I was in charge of the file, in charge of the records, but I was not the clerk that did the work.

The Court: Do you know of your own knowl-

(Testimony of Mary B. Lewis.)

edge what part of the file was sent to the appeal board?

The Witness: Yes, I do, because it is a custom and a practice——

The Court: I am not interested in the custom and practice.

The Witness: I signed the form, and I myself put this in an envelope and mailed it to the appeal board.

The Court: When you put the original file in an envelope and mailed it to the appeal board, were the two pamphlets in question with the file?

The Witness: They were.

Mr. Mitsumori: I have no further questions.

The Court: You have got another problem here, I think. The only evidence before the court is the statement of the defendant relative to what happened before the local board. When [43] you have this witness on the stand, shouldn't you go into that question?

Mr. Mitsumori: No.

Q. I will ask you, Mrs. Lewis, whether or not you were present at any local board hearing at which time the registrant was present?

A. No.

Q. On or about the 4th day of December, 1951?

A. No, I was not present.

Q. Who was the clerk of the local board at that time? A. Ann Van Blaricon.

Q. Do you know whether or not she was present of your own knowledge?

(Testimony of Mary B. Lewis.)

A. Well, she is the one who wrote up the meetings.

Q. Who wrote the minutes of the meetings?

A. Yes. She wouldn't be able to write up a summary of the happenings unless she was present.

Q. But you were not present? A. No.

Mr. Mitsumori: I have no further questions.

Cross-Examination

By Mr. Tietz:

Q. What did you say your present title is?

A. What was the question? [44]

Mr. Tietz: Please read it.

(Question read.)

The Witness: I am a clerk for Selective Service. I act as co-ordinator.

The Court: You are a clerk, but you are not the clerk?

The Witness: All the girls in the office are clerks and I am in charge.

The Court: There is one who is designated as the clerk?

The Witness: Well, Ann Van Blaricon was the clerk. We are all clerks.

The Court: Who has the official designation of clerk?

The Witness: Of clerk of this board?

The Court: Yes.

The Witness: A girl by the name of Laura Predzik. She was placed in charge of the board

(Testimony of Mary B. Lewis.)

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The Witness: Of clerk of this board?

The Court: Yes.

The Witness: A girl by the name of Laura Predzik. She was placed in charge of the board

(Testimony of Mary B. Lewis.)

just about two weeks ago. In other words, I have to designate girls to handle certain work.

The Court: I thought we were going to have the clerk of the board who had knowledge of this matter.

Mr. Mitsumori: I was under the impression we did have such a party here, but I understand the clerk is no longer with the board, that is the clerk that was the clerk during the period in question, that is during 1951 and 1952. Mrs. Lewis the co-ordinator. She has supervision over all the [45] clerks.

The Court: Well, I am satisfied with the testimony relative to what was sent to the appeal board, but we have a charge made by the defendant as to what they consider misconduct on the part of the board members. I have no reason to disbelieve the defendant. I am going to have to take his testimony as he gave it unless there is some testimony to the contrary. I supposed you were going to have this morning someone who would testify to what happened at the hearing. This witness can't.

Mr. Mitsumori: Our review of this case, your Honor, is strictly confined to the record in the case. We are certainly not required to and the law does not require us to produce board members or to probe into the mental processes of the board as to why they did that or how they did it.

The Court: I am not trying to probe into the mental processes, but do you mean to tell me when a clerk of a board writes up a summary of proceed-

(Testimony of Mary B. Lewis.)

ings before the local board that the defendant can't come in and testify as to proceedings that were not set forth in the summary? According to the summary that was filed in this case by the clerk or by the local board, there was nothing here relative to some of the testimony made by the defendant. Do you think a member of a local board has a right to say to a registrant, "You are yellow"? I think this is a serious charge. I think there should be some refutation in the record, if you can get some refutation. [46]

Mr. Mitsumori: I don't know whether I am going to be able to get it, your Honor.

The Court: This is a criminal case. If you don't get it, it may raise a reasonable doubt and I will have to find the defendant not guilty. This is not a habeas corpus case where the burden is upon the petitioner, but the burden here is upon the government to establish beyond a reasonable doubt. If the testimony of the defendant raises in the mind of the court a reasonable doubt relative to the conduct of the members of the board at the hearing, there is nothing I can do except find the defendant not guilty.

Mr. Mitsumori: Of course, the final step in this case was not confined to what happened at the local board. He was given a personal appearance hearing. He was given an opportunity to present his facts. He admitted that on cross-examination, that he was given an opportunity to present evidence, reasonable evidence, which he did, in the form of affidavits

(Testimony of Mary B. Lewis.)

and letters from friends to support his position. He was also given the opportunity of presenting those two pamphlets, which he testified he did. On direct examination he testified he was not given an opportunity to present any form of pamphlet, and yet on cross-examination he admitted yes, he was given an opportunity. I believe we went over the question of whether or not he could submit a truckload of pamphlets, also, at that time. After all, the regulations specify that material that [47] can be presented by the registrant must be as concise as possible. Certainly the board has that discretion.

The Court: I am not talking about the material at the present time. I am talking about the charge made here that the local board was arbitrary in the classification.

Mr. Mitsumori: Of course, the registrant after the hearing had taken place and after he had been classified 1-A by the local board, after the personal appearance, he had the opportunity of appeal, which he did, and he also had the presidential appeal. He had two appeals from the local board hearing. The question is whether or not the defendant was prejudiced, substantially, that he was denied procedural due process in his classification.

The Court: Mr. Tietz, the other day I rendered an opinion in the Lynch case, I think it was, in which I pointed out that the classification by the appeal board was an entirely new classification and I thought it corrected any errors that occurred and

(Testimony of Mary B. Lewis.)

it didn't affect the substantial rights of the defendant. Let's assume, just for the purpose of argument, that the local board was arbitrary, let's assume that they made the statements the witness said that they made. Nevertheless, they went ahead and made a classification. There was an appeal and there was a hearing before the hearing officer. The defendant testified he did appear before the hearing officer. The hearing officer reviewed the entire file, together with the [48] additional information, made his recommendation to the Department of Justice, and the Department of Justice made the recommendation to the appeal board, and the appeal board followed that recommendation and reclassified him. Under the Lynch case, is it material whether or not the board was arbitrary?

Mr. Tietz: Yes, sir, for this reason. The registrant is entitled to due process of law at every step of the proceeding. He is entitled to a fair deal.

The Court: I understand that you like the Lynch case.

Mr. Tietz: Oh, no.

The Court: You can't like part of it and dislike another part.

Mr. Tietz: What your Honor did in the Lynch case was to rely on the Eighth Circuit decision, and that is the part that is bad, because it leads your Honor astray on these other matters.

The Court: Since that time, Mr. Tietz, if I was rewriting that, I have found two cases in the Ninth Circuit that come to the same conclusion. I based

(Testimony of Mary B. Lewis.)

my opinion upon the Tenth Circuit case, I think it was, but, however, the Ninth Circuit says the same thing.

Mr. Tietz: Not altogether. It is unquestionably good law and it is the law in the Ninth Circuit, that on questions of fact the decision of the appeal board is final, unquestionably. However, the decision by an appeal board can never cure [49] an illegality below.

The Court: Well, I disagree with you. If there was something done by the local board that does not affect the substantial rights of the defendant, the decision of the appeal board is final and it wipes out any defects. Now, however, the thing I was interested in in this case is that all the evidence was not sent to the appeal board.

Mr. Tietz: That is one thing.

The Court: If the appeal board didn't have all the evidence, then, of course, the decision of the appeal board wouldn't wipe out the defect, if there was a defect, in the local board. But it appears now that the evidence did go up, although the record didn't show it went up, but it appears the evidence did go up.

Mr. Tietz: In the first place, I am not through cross-examining, and it may not be a fact in the Court's mind that it did go up. The Court may have doubt about that.

The Court: Now you can proceed with your examination.

Mr. Tietz: Thank you.

(Testimony of Mary B. Lewis.)

Q. Your duties are to supervise the work of how many boards? A. Five.

Q. Five boards. Those five boards have what the social workers would call a case load of 35,000 registrants, don't they? [50]

A. The five boards, yes.

Q. This personal appearance hearing was on December 4, 1951, wasn't it?

A. I haven't checked. On December 4, 1951?

Q. You were not present? A. No.

Q. On December 14, 1951, the cover sheet was sent to the appeal board, right?

A. That's right.

Q. During the month of December, 1951, how many appeals did you have any part in forwarding to the appeal board, can you tell us? A. No.

Q. Back in those days, you had quite a number of appeals, did you not?

A. Well, we still do. I suppose we had them, yes.

Q. Didn't you have more appeals during that month than almost any other month?

A. I wouldn't know that.

Q. Isn't that the month when the board started the bookkeeping shift from 4-E to 1-O, and all these young fellows were concerned about it?

A. I haven't checked that. We have other appeals besides the 4-E and 1-O.

Q. How many appeals would you say you have had to look [51] over in the last two years?

(Testimony of Mary B. Lewis.)

A. Well, I have never counted them, so I wouldn't know.

Q. Aren't any records kept of the number of appeals that go up from these boards?

A. We keep no record of the number that go up, no.

Q. So you can't tell us whether there were 200 or 300 appeals from all these boards together out of these 35,000 registrants?

A. I wouldn't have any idea how many went up during that month. That seems like a large number, but I never kept a record of it.

Q. When you look at this exhibit that is before you, the original file, can you see any place there where you checked off by initial or any other way the documents that actually went up to the appeal board?

A. No, because I don't check them off.

Q. You don't check off the documents that go to the appeal board?

A. No. I would have to look at every one, if I did. That is the reason we would have a——

Q. There is no way you can tell us that you kept a record of what went to the appeal board or didn't go?

A. I know we keep nothing out, the entire file is mailed.

Q. That is the general practice? [52]

A. It was the practice in this case, also.

Q. You mean you actually did it in this case?

A. You mean sent the whole file?

(Testimony of Mary B. Lewis.)

Q. Yes. A. Certainly, we did.

Q. Did you send what is called the out-file, the secret interdepartmental communications?

A. We have no secret out-file on this. When a file is sent to the appeal board, the whole files goes and we merely keep a copy of the 120.5 form. That stays in the out-file, because we have to have a record of where the file is. That is our record that we have sent the file to the appeal board.

Q. You mentioned you do have an out-file. What is this out-file?

A. It is just a charge-out sheet.

Q. A sheet?

A. Yes. It says "Out," and carries the name and number of the registrant.

Q. And has a folder still on?

A. Not necessarily, no. The only thing it would have in it would be that 120.

Q. How do you find this sheet called out-file?

A. Well, it is filed right where the file would be filed if it was in the office.

Q. When a registrant comes to your office and says, "I [53] want to make a copy of my file," do you give him everything that is in the file so he can copy it? A. Yes, we do.

Q. Do you know and does your file reflect whether or not this defendant, Bernard Henry Ashauer, came to the office of your group of boards in the fall of 1953 and asked to copy his file for his lawyer?

(Testimony of Mary B. Lewis.)

A. I do not know. I have no record of whether he did or did not.

Q. Isn't there any record of it there?

A. Well, this file, there is no record here, no, of that.

Q. Aren't you required to keep the record of the individual action in coming in and asking to make a copy of his file?

A. Not necessarily, no. Sometimes we do, sometimes the clerks do. It isn't required we make a record that he came and asked for his file.

Q. Do you know whether or not there is a record in your file that he came to the office and asked to make a copy of the file?

A. I have no record of it in this file.

Q. Do you recall it was done?

A. No, I don't. I talk to so many.

Q. Do you know whether or not on the occasion when he [54] came there and he was given the file to copy, that certain portions of the file which you have in front of you now, these two booklets, were not in the file?

A. I don't ever remember of him coming there, so I wouldn't know.

Q. That is what I am asking.

A. But these two booklets have been in the file all the time. They have never been removed.

Q. Would you repeat that, please?

A. These two booklets have been in this file. They have never been removed.

(Testimony of Mary B. Lewis.)

Q. You can testify to that of your own knowledge? A. Yes.

Q. Are you the only one that has access or control over the file?

A. Well, I am not, no, but my girls have been instructed they are not to remove anything like that from the file.

Q. Then you mean you have instructed them to follow the regulations and not take anything out of the file, is that right?

A. Certainly. They know that.

Q. Did you have anything to do with the photostatic copy of this file?

A. With the photostatic copy of the file—— [55]

Q. With making it or ordering it?

A. No, I did not.

Q. You mean one of the girls takes care of it?

A. We mailed the file out for photostating.

Q. You mailed it out?

A. No, I don't know that I did, no. It might have been mailed out by one of the girls. That I don't know. I don't remember who mailed it out. It is entered on the back that it was mailed out.

Q. You are willing to testify of your own knowledge these two pamphlets were in the file at all times after December 4, 1951, is that right?

A. After December 4, 1951?

Q. Yes. A. Yes.

Q. And that is the date of the personal appearance hearing? A. That's right.

Q. You haven't any doubt about that?

(Testimony of Mary B. Lewis.)

A. No, I haven't.

Q. That they were there at all times?

A. I have no doubts but what they were there at all times.

Q. Are these files kept in a locked file drawer?

A. Not until after they are—not all the files. They [56] are after they are reported as delinquent, then they are kept in a locked file.

Q. Before that, they are in a great mass of open files? A. That's right.

Q. To which the clerk of the local board and everybody in the office has access?

A. That's right.

Q. Where are these locked files?

A. They are right there in the office.

Q. Where all the other files are?

A. They are right there in the office with the other files.

Q. Isn't it a fact when a person comes and asks to see his file or the file of his client, that he is generally met with a statement, "It will take us a few minutes to get the file in order"? A. No.

Q. You have used that statement and nobody at your board has used that statement?

A. No. We never have to get the files in order. They are in order all the time, a continuous thing.

Q. You mean the file is always complete and everything is in it that should be except the last day or two mail, right? A. That's right. [57]

The Court: Any other questions.

Mr. Tietz: No.

(Testimony of Mary B. Lewis.)

Mr. Mitsumori: No questions.

The Court: May this witness be excused?

Mr. Mitsumori: Yes.

Mr. Tietz: Yes.

The Court: You may step down.

(Witness excused.)

Mr. Tietz: The defendant requests permission to reopen his case and take the stand again.

The Court: Well, just a minute now. Do you have any other testimony?

Mr. Mitsumori: No, I have no other testimony. I will offer Government's Exhibit 1-A into evidence.

The Court: It may be received in evidence.

Mr. Mitsumori: It is stipulated by counsel this may be withdrawn at the conclusion of these proceedings? Mr. Tietz has offered to place in the photostatic copy of the file a full and accurate duplicate copy of the Watchtower and the God and the State pamphlet.

The Court: It may be withdrawn when Mr. Tietz provides a copy of the enclosures.

Mr. Mitsumori: Very well.

The Clerk: It will be marked 1-A in [58] evidence.

(The exhibit referred to was received in evidence as Government's Exhibit No. 1-A.)

The Court: All right, Mr. Tietz, I will grant your motion to reopen.

Mr. Tietz: Thank you. Mr. Ashauer, will you take the stand again?

BERNARD HENRY ASHAUER

the plaintiff herein, having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Tietz:

Q. Mr. Ashauer, I will hand you three small pamphlets, about 5 by 6 inches in dimensions, with a thickness each of about 1/8 of an inch, one entitled Neutrality, one entitled Loyalty, one entitled Jehovah's Servants Defended, and ask you if you can identify them.

A. These are the three books that I wanted to have in my file and they were the ones that they refused to put in.

Q. You mean at the personal appearance on December 4, 1951, before the local board?

A. That's right.

Q. Are those the exact ones or are those duplicates, or what?

A. No, these are the exact ones, because I had them [59] marked a little bit so if they would read through them, they could see a few of the pencil marks in there.

Q. Are they in the same condition, substantially, that they were on the day that you offered them to them? A. Yes.

Q. All the pages are there, no pages added?

A. No.

Mr. Tietz: I ask that they be marked for identification as Defendant's Exhibits A, B, C——

(Testimony of Bernard Henry Ashauer.)

The Clerk: It would be C, D, and E, your Honor.

The Court: C, D, and E, they may be marked.

The Clerk: Defendant's Exhibits C, D, and E for identification, so marked.

(The pamphlets referred to were marked Defendant's Exhibits C, D, and E for identification.)

Mr. Tietz: I ask that they be admitted in evidence.

The Court: They may be received in evidence.

The Clerk: C, D, and E in evidence, so marked.

(The pamphlets referred to were received in evidence and marked Government's Exhibits C, D, and E.)

Mr. Tietz: There is one other matter. May I confer with my client? He told me something and I forget what it was.

The Court: All right.

(Short interruption.) [60]

Q. (By Mr. Tietz): When you employed me to act as your lawyer in this prosecution, I told you to go to the local board office and make me an exact copy of the file that they had there on you, didn't I?

A. That is correct.

Q. Did you go there? A. Yes, I did.

Q. Did you see your file? A. Yes, I did.

Q. I am going to hand to you Government's Exhibit 1-A and ask you if this is what you saw when you were there. Let me interrupt my own ques-

(Testimony of Bernard Henry Ashauer.)

tion. About what date did you go to the local board to make this copy?

A. Well, that I don't know. It is the date I came to your office and you told me to go down there the next day to get the file ready.

Q. You came to me after you were indicted?

A. That is correct.

Q. It was some time in August, 1953, then.

A. Yes.

Q. Do you have in mind the question I asked you, if that was the file that you found at the local board?

A. I found everything in it but this here. When I was there, they handed it to me piece by piece and said I could copy what I had to have, and that I had to return it piece by [61] piece. Then I was speaking to this particular lady here and she turned the file over like this and says if there is anything else I would want, and I took what I thought I had to have for you, and these booklets here I didn't see. That is why I asked you if this was the file.

Q. When you say "these booklets here," will you give us the names and pagination of them?

A. God and the State.

Q. What page is that? 20 and 21, isn't it?

A. This is 20, and the Watchtower is 21.

Mr. Tietz: You may cross-examine.

The Court: You say that the entire file wasn't given you as a whole, it was given you piece by piece or sheet by sheet?

The Witness: That is correct.

(Testimony of Bernard Henry Ashauer.)

The Court: Where were the sheets kept that weren't given to you?

The Witness: At first there was a girl that I had to take them sheet by sheet, and then I went up to this particular lady here and she had the file like this and she turned the file over and said, "You take out what you want and copy it, and as you copy it, you bring it back to me."

The Court: Did you take the entire file?

The Witness: No, I didn't. Piece by piece. She would turn it over like this and I would say, "I want this here."

The Court: How do you know that the two documents in [62] question were not in the file? You say you never saw them.

The Witness: The file was like this. She would be here and she would be turning them over like this, and I would say, "I would like to copy this," and she would say, "All right," and when I was through I had to hand them back to her.

The Court: All right.

Cross-Examination

By Mr. Mitsumori:

Q. Mr. Ashauer, going back to December 4, 1951, the personal appearance before the board, you stated you offered Defendant's Exhibit D, these three pamphlets? A. Yes.

Q. You offered those to the members of the local board, is that correct? A. That is correct.

(Testimony of Bernard Henry Ashauer.)

Q. Do you recall how you offered them when you handed them to the local board and to whom?

A. Yes. When I was there at the local board they told us, someone from our organization, "If you have something in your file that they could read, it would be better for your case." So I had pieces of paper, the affidavits, and I had these particular books, because they do sort of explain things that maybe I couldn't say as well, and like I said, I knew that I only had 15 minutes there, so I asked them if they would put [63] that in my file so if it had to go on any further, it would be in there, and they said no, they couldn't take that because it would be a little bit too bulky.

After I told them I thought it should be in there and I was going to call our lawyer, one of them said, "I think we'd better take these pieces of paper," and I think they took the Watchtower and this pamphlet with it, but I think the other three they refused to take.

The Court: Did you offer all five pamphlets together at one time?

The Witness: To be perfectly true, I don't really know. I offered some material when I was before Mr. Friedman, and he accepted some of it.

The Court: Who is Mr. Friedman?

The Witness: He is the appeal officer.

The Court: The hearing officer?

The Witness: Yes.

The Court: Let's go back to the local board. You

(Testimony of Bernard Henry Ashauer.)

went before the local board and you had five of these pamphlets?

The Witness: Right.

The Court: Your testimony is they accepted two and refused to accept three?

The Witness: I think so.

Mr. Mitsumori: Your Honor, he testified he wasn't sure how many he had. [64]

The Court: What I am trying to find out is, did you present all five to the local board?

The Witness: Well, as far as I can recollect. I like to say the truth. Yes, I think I did.

The Court: You don't know?

The Witness: Well, yes, I was up there, and as I can recollect there was five, and then when I went up before Mr. Friedman, I had some more.

The Court: Let's forget Mr. Friedman. I will come to him in a minute. You had five. Did you give the five into the hands of the local board?

The Witness: Yes, I did.

The Court: Did they examine the five?

The Witness: No, they didn't. They just says, "Well, we will take these." Then when I mentioned his name, they said, "We better take these pieces of paper," and they took the affidavits and two booklets.

The Court: What about the other three?

The Witness: They said, "You can take these home with you again. They will make the file too thick."

The Court: When you went before the hearing

(Testimony of Bernard Henry Ashauer.)

officer, Mr. Friedman, did you again offer these pamphlets to Mr. Friedman?

The Witness: No, I did not. I just offered him some affidavits.

The Court: You didn't offer the pamphlets to Mr. Friedman? [65]

The Witness: No.

The Court: But you offered him some affidavits?

The Witness: That's right, and he took them.

The Court: Mr. Friedman did not refuse to accept the pamphlets?

The Witness: No, he did not.

Q. (By Mr. Mitsumori): Mr. Ashauer, you said that you submitted five documents at the time of the local board hearing, is that correct? A. Yes.

Q. Among those five documents, what constituted those letters and affidavits from your supporting friends and those which constituted pamphlets and books?

A. I don't know what you mean.

Q. How many letters or affidavits and how many books did you take with you at the time of the local board hearing?

A. Well, as I can recollect, I think there were three affidavits and those particular booklets [66] there.

Q. These three books here?

A. That is correct.

Q. How about the two that are contained in the file, the Watch tower and God and the State, when did you submit them?

(Testimony of Bernard Henry Ashauer.)

A. Well, as I can recollect, I think I had them at the same time.

Q. And you had more than five documents?

A. Well, yes, I guess so, if you want to call it that.

Q. You had eight. In fact, you submitted four letters and affidavits from supporting friends.

A. Well, they are in the file, yes, there are quite a few. Like I said, I can't remember if I gave them three at that particular time and then I had some when I had to go before the Appeal Board and I gave some. Like I say, it has been a year or so back.

Q. How many times would you say you made visits to the local board since you were classified 1-A by the local board back in 1951, including the local board hearing?

A. Well, I had 4-E, and I got that right away. Then I was made 1-A. Then I went there for my personal hearing, and I had my hearing, and I gave my evidence, and then I went before Mr. Friedman, and just went up the line. I guess it was only once.

Q. You only made one trip to the local [67] board?

A. And then, like I say, for the file, so it is twice, I believe.

Q. Where have these three pamphlets been kept since 1951, December, 1951? A. In my house.

Q. Are you positive that those are the same pamphlets that you had? A. Absolutely.

Q. You are absolutely sure of that?

A. Yes, I am.

(Testimony of Bernard Henry Ashauer.)

Q. Can you tell us, as nearly as you can recall, what board member refused to accept those three documents, three pamphlets, and what he said to you?

A. Yes, I could. There were three of them sitting there and one gentleman was doing all the talking. He was kind of an elderly man. I think his name is on the draft card. He is the one that done the signing. He said it would just make the file too full and he couldn't put them in the file.

Q. What did he say when you submitted the Watchtower and God and the State, those two pamphlets?

A. Like I say again, when I told him I was going to call Mr. Covington, the other gentleman, he says, "Well, I think we better take these for the file."

Q. They did take those in the file? [68]

A. They took those in the file when I said I was going to call the lawyer.

Q. They told you they didn't want to take them because they were bulky, is that correct?

A. That is correct.

Q. You stated sometime after you were indicted you were instructed by Mr. Tietz, your attorney, to go down to the local board?

A. That is correct.

Q. To examine your file, copy pertinent portions of the file? A. That is correct.

Q. What part of the file did you examine specifically now? By examining the original file before

(Testimony of Bernard Henry Ashauer.)

you, will you tell us what specific documents you copied and that you reported back to Mr. Tietz?

A. Yes, I can give them all to you.

Q. Which ones did you look at?

A. This one here—I took a look at all of them, as far as that goes, and I copied this one here, and this one, this Selective Service System, personal appearance, and then, like I said, I went through the file like this, and he told me to take the most important ones out that would pertain to the file and to the members of the Appeal Board.

Q. And is your testimony you didn't see the Watchtower [69] and God and the State?

A. That is correct.

Q. Did you look for them?

A. No, I didn't exactly look for them, but an object like this I am sure I would remember it when the file was turned over page by page.

Q. But you weren't looking for those two documents, were you? A. No.

Q. You are not positive whether they were in there or not then?

A. Well, as far as that, like I said, I didn't see them in there, no.

Mr. Mitsumori: No further question.

The Court: Any other questions?

Mr. Tietz: None, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Tietz: We have no objection to the govern-

(Testimony of Bernard Henry Ashauer.)

ment calling board members or any other available persons who were present to testify concerning the matters that transpired at the hearing.

The Court: Do you want to attempt to get in touch with any individual board members?

Mr. Mitsumori: If the court wishes that I have a board [70] member here, I will try to make such arrangements to do so, but I don't know whether it is necessary.

The Court: I am satisfied that if I hold against the defendant, hold he is guilty, there will be an appeal. In case there is an appeal, you have got the testimony of the defendant. There is no reason to say the defendant is not telling the truth. I don't know. I have nothing to justify such a statement as that. He is presumed to speak the truth. Then we have in the record only the statement made by the defendant. If the matter goes up on appeal, I would think it would think it would be important to have a statement from the board member as to what actually happened.

Mr. Mitsumori: I will arrange to have one board member. Will one be sufficient, Mr. Tietz?

The Court: You are not doing it for Mr. Tietz or for me. You are doing it for your record. Now, you make your record, because you will have to stand upon your record when it goes on appeal.

Mr. Mitsumori: This is a criminal proceeding. Of course, on the other hand, too, your Honor, in this type of a case we are merely confined, as well established by the case law, to the record in the case.

I don't want this case to go de novo again and have this court sit as the appeal board or the local board.

The Court: I am not going outside the record except [71] this, that if a defendant comes into court and says, "Sure, that is the record, but that is not the entire record. We presented something that is not in the record," then I certainly have a right to go into that matter, do I not?

Mr. Mitsumori: You mean some other matters, your Honor, that have been presented outside of the record?

The Court: We have got two problems that the court will have to decide. One problem is whether or not the board acted arbitrarily. Assuming it did act arbitrarily, then whether or not that has any effect upon the substantial rights of this defendant. The second problem is whether or not the board refused to receive the evidence as offered by the defendant. Now, it would seem to me if a registrant goes in to the local board and produces certain records and says, "I want this as part of the file," unless there is some pretty good reason, it should be made a part of the file. If they did make it a part of the file and it was never considered by the appeal board, then I don't think the decision of the appeal board would be binding, would be final. As far as I am concerned, I can decide this case upon the evidence before me, but I think for the benefit of the record that you really ought to get a member of the board here to testify to what actually happened at this hearing. At least you can get a conflict of the evidence.

Mr. Mitsumori: Well, yes. [72]

The Court: Maybe. I don't know.

All right, I will continue the matter to 10:00 o'clock tomorrow morning and trust you will be able to have a member of the board here.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., November 5, 1953.) [73]

September 24, 1953—10:00 A.M.

The Clerk: No. 23002, United States vs. Ashauer, further trial.

Mr. Mitsumori: We are ready to proceed, your Honor.

The Court: You may proceed.

Mr. Mitsumori: Mr. Pattison.

ANDREW K. PATTISON

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please? Will you please state your name?

The Witness: Andrew K. Pattison, P-a-t-t-i-s-o-n.

Direct Examination

By Mr. Mitsumori:

Q. What is your business or occupation?

A. Real estate investments.

Q. You are a member of the local Board 83, are you not? A. That's right.

(Testimony of Andrew K. Pattison.)

Q. In Burbank?

A. North Hollywood at the present time.

Q. How long have you been a board member of that local board? A. I believe five years. [75]

Q. Were you a member during December, 1951?

A. Yes.

Q. Will you please tell the court what the nature of your duty is as a board member of that particular local board?

A. Well, we are to classify the registrants as to their classification, with regard to going into the Army, and we do that on the questionnaire that they fill out and the facts that are brought up before us, and one thing and another.

Q. Do you also conduct hearings before your board? A. Yes, we do.

Q. You sit as board members? A. Yes.

Q. When a registrant requests a personal appearance, do you not? A. That's right.

Q. Do you recall at this time, Mr. Pattison, whether or not a registrant in your board by the name of Bernard Henry Ashauer came before you and the members of your board for a personal appearance hearing on or about December 4, 1951?

A. Well, I couldn't recall it, no. It is two years ago. I wouldn't be able to recall that only by the records that would be available. I couldn't remember that. [76]

Q. If I showed you a copy or the original minutes of the board meeting of that day, would that refresh your recollection? A. Yes.

(Testimony of Andrew K. Pattison.)

Q. I will show you the original selective service file of Bernard Henry Ashauer, page 25 of the file, which is designated personal appearance, Bernard Henry Ashauer, Selective Service, December 4, 1951, and at the top board members present, and a Mr. Pattison is listed. Are you that Mr. Pattison?

A. Yes, I am.

Q. Will you examine that page, Mr. Pattison, and I will ask you whether it would refresh your recollection as to the hearing and the appearances there.

A. Well, yes. I would say that is right. We were all present.

Q. Does the minute reflect correctly, as nearly as you can recall, what took place at the personal appearance?

A. Well, no. I wouldn't say I could remember everything that took place at that time. We have 12,000 names to go over and all kinds of personal appearances, and over a period of years I can't remember exactly what took place, no.

Q. You wouldn't remember the defendant on trial in this case, would you?

A. Well, I wouldn't swear to it. No, I don't believe [77] so.

Q. How many personal appearances have you sat in on, Mr. Pattison, during the course of your service with the local board?

A. Maybe an average of probably maybe 50 a year for five years, probably 250, I would say, a

(Testimony of Andrew K. Pattison.)

rough guess of 250, maybe 300. That is not persons, that is days. During each one of those days we might have had as many as five or ten people.

Q. When a registrant appears before the board for a personal appearance, would you tell the Court how the hearings are generally conducted?

A. The first thing the chairman——

Mr. Tietz: If the Court please, I do not think we are so much concerned with the general practice as we are with what happened to this particular registrant.

The Court: Overruled. He may answer.

The Witness: At this particular session, Mr. Douglas, who was the chairman at that time, he generally swears in the registrant. After that, why, he calls him by name and tells him to tell his story.

Q. (By Mr. Mitsumori): Who was present at the personal appearance hearings besides the board members? A. The clerk.

Q. The clerk? [78]

A. At that time it was Ann Van Blaricon.

Q. She is no longer clerk? A. No.

Q. And who usually conducts the hearing?

A. Generally the chairman does. They ask, the registrant tells his story. After he gets through, any one of the other members might ask him a question.

Q. Is the registrant generally advised in any manner by the local board?

A. If he is appealing his case, we tell him when he is through, if there is anything else he wants to put in the file in the way of letters, writing, or any

(Testimony of Andrew K. Pattison.)

other thing that might help him, he must get it in the file, because if it goes to the appeal board, the file is the only thing that they go by, that is not a personal appearance.

Q. To your knowledge, from your experience as a board member and having sat through many board hearings, as you have testified, has the board at any time refused, to your knowledge, to accept pamphlets, books, or any writings that would be offered by the registrant? A. No, we have not.

Mr. Tietz: I am objecting, your Honor, to the line of questioning that goes to the usual practice and I would like a continuing objection.

The Court: You may have a continuing objection and the [79] same ruling. Overruled. We have here a witness who, because of the number of cases, cannot recollect.

Mr. Tietz: I beg your pardon? I did not hear.

The Court: We have here a situation where the witness, because of the number of cases the local board handles, cannot recollect distinctly each individual case.

Mr. Tietz: I realize the difficulty.

The Court: That is natural.

Mr. Mitsumori: We are only trying to help out the court.

The Court: When I was in Internal Revenue, I used to say I only knew two classes of employees, the very good and the very bad. The general run of employees I never knew. They had to do something to attract my attention. If anything happened to

(Testimony of Andrew K. Pattison.)

attract this witness' attention, he would probably remember it, but if there wasn't anything out of the ordinary, he wouldn't remember. So your objection is overruled. I think this is the best evidence we can get.

Mr. Tietz: I object, of course, as to the relevancy and competency. That it may be the best is another matter, your Honor.

The Court: Objection overruled. Will you read the question, the last question?

(Question read.)

The Court: Now will you read the answer, if there was an answer? [80]

(Answer read.)

Q. (By Mr. Mitsumori): Do you recall, Mr. Pattison, to your knowledge, from sitting as a board member, where any board member has made any derogatory statements or an accusatory statement as to the state of mind or the character of the registrant? A. No.

Mr. Mitsumori: I have no further questions.

Cross-Examination

By Mr. Tietz:

Q. You have been asked a number of questions concerning the usual procedure and conduct of these appearances before the local board by registrants. You have told us that you have attended perhaps 250 appearances, multiplied perhaps by five or ten

(Testimony of Andrew K. Pattison.)

each day. Am I correct in my figures that there have been 50 of these days a year for five years?

A. That is once a week, isn't it, 50 a year?

The Court: Approximately.

The Witness: That is what I meant, that's right.

Q. (By Mr. Tietz): And you had five to ten of them a day?

A. No, I didn't say five to ten. Sometimes as many as ten. Sometimes only one.

Q. So there is a minimum of 250 of these appearances [81] and there might be as many as 500 or 1000 of them, the appearances that you have had in the 5-year period?

A. Could be, yes. I don't want to make a statement of the exact amount but, of course, that is approximately it.

Q. We are dealing with approximations.

A. That's right.

Q. Can you give us an approximation of about how many of them were Jehovah's Witnesses?

A. No, sir, I couldn't.

Q. Are they more numerous than any other identifiable group at the personal appearances?

A. No, I don't believe they are.

Q. Are there many of them?

A. Yes, there are quite a few of them.

Q. Would you say that of the total number over all these years you have had perhaps 50 of them?

A. I wouldn't say without going out and checking over the records before I would make that statement.

(Testimony of Andrew K. Pattison.)

Q. But it does stay in your mind that you have had a considerable number? A. Yes, we have.

Q. Can you recall anything of this personal appearance of Bernard Ashauer after looking at the file?

A. No, I can't recall that exact meeting, no.

Q. If I gave you some pamphlets, one entitled God and [82] the State, a 32-page pamphlet, one a little magazine entitled The Watchtower, dated February 1, 1951, if you looked at them, would they mean anything to you?

A. Well, I have seen a great many of these Watchtower magazines, yes. I don't know how many of these other. I wouldn't know whether I have seen any of them, but I have seen that Watchtower magazine a great many times, yes.

Q. Can you recall if you ever saw either of these two before December 4, 1951?

A. I have seen them in practically every file of a Jehovah's Witness, that is about all I can say. I can't say any individual one, but they are generally in all the files of Jehovah's Witnesses.

Q. Have you seen other pamphlets or little magazines other than these in Jehovah's Witnesses files?

A. I don't know whether I have or not.

Q. What makes you believe that you saw those two?

A. The Watchtower is one that they sell on the corner, that is one that looms up more than any one in my mind. That is the reason I say that, be-

(Testimony of Andrew K. Pattison.)

cause it stands out more. I have seen that a great many times.

Q. Do you recall if there is anything unique or significant about that particular one that is before you, dated February 1, 1951? A. No. [83]

Q. It says in its front it is a semi-monthly publication. Do you recall whether you have seen more than one different issue?

A. You mean do I read the dates on each one of them?

Q. Yes. A. No, I don't.

Q. Do you read what is in them?

A. I have gone through them, but I can't say I made a study, no.

Q. Have you gone through every one that has been handed to you? A. No.

Q. You mean that some of these that have been handed to you, you haven't gone through?

A. I haven't read them, that is correct.

Q. Can you tell us whether or not you read that particular one?

A. No, sir, I could not tell you that.

Q. When I say that particular one, I mean that issue of February 1, 1951.

A. No. I am sorry. I didn't read the dates on that, no.

The Court: Can you look at the document and tell us whether or not you have ever read it?

The Witness: Well, he mentions the date on it. I don't [84] know whether I ever read that issue there.

(Testimony of Andrew K. Pattison.)

The Court: Look on the inside and see what the inside says.

The Witness: But I have read——

The Court: The question is, have you ever read that document as a whole.

The Witness: With the name Watchtower on the outside, yes, I have read one of them.

The Court: This is a publication which is published semi-monthly or twice a month.

The Witness: Yes, sir.

The Court: Now, whether you have ever read one is not the question. The question is, have you read this particular one.

The Witness: Well, I don't know whether I have or not.

The Court: Can't you look at it and say whether or not you recollect any of the contents?

The Witness: No.

Mr. Mitsumori: Your Honor, I am going to object to further questioning along the lines of whether or not the board member read this particular issue. I don't think it is relevant in this case. I think counsel is attempting to lay a foundation to probe into the mental processes of the local board member, which goes to the question of classification.

The Court: I think it is a more serious problem than [85] that. If a registrant comes before a board and presents affidavits, publications, is the board supposed to read them? They certify they have considered them. Can they consider them without reading them? Is it a duty of the board to consider

(Testimony of Andrew K. Pattison.)

everything that is presented by the registrant. If it is, about all the board would do is read. Is it necessary?

The Witness: We read all letters.

The Court: And affidavits?

The Witness: Yes.

The Court: But you don't read all pamphlets?

The Witness: We don't read every one of them, no. We wouldn't have time to read them all.

The Court: You may continue.

Q. (By Mr. Tietz): Then you are reasonably certain, to the best of your recollection, that you have never read that particular one that is in front of you?

A. I won't say yes, whether I have or haven't. I just can't answer that question.

Q. You want to help us. Have you ever read any publication of the Watchtower dated February 1, 1951? A. I don't know.

Mr. Mitsumori: He said, your Honor, he couldn't recall whether he read it or not.

The Court: He says he doesn't know.

Mr. Mitsumori: He says he couldn't recall whether he [86] did read or didn't read that particular issue. Counsel is merely repeating the question.

Q. (By Mr. Tietz): Now, may I present to the witness for his inspection Exhibit D, consisting of three publications called Loyalty, Neutrality——

The Clerk: C, D, and E, Mr. Tietz.

Mr. Tietz: D bears the clerk's stamp. Oh, yes,

(Testimony of Andrew K. Pattison.)

they all bear the stamp right upon the publication. I will withdraw what I have said and reframe the question, with the court's permission.

Q. I will present to the witness, then, Exhibit C, which is entitled Jehovah's Servants Defended, Exhibit D, which is entitled Loyalty, and E, which is entitled Neutrality. Will you please look these over?

A. All right.

Q. You have had an opportunity now, Mr. Pattison, to look over these pamphlets. Are they at all familiar to you?

A. No, I can't say that they are.

Q. Are they either familiar or unfamiliar to you in the same sense that the other two publications, the Watchtower of February 1, 1951, and the other one, God and the State, are?

A. They are just not familiar, that's all. I don't know in what connection they are not familiar, but they are not familiar. [87]

Q. Do you recall if you have ever seen anything like that? A. Yes, it is possible that I have.

Q. Do you recall that you have ever read any part of those?

A. No, I can't say that I can recall.

Q. Do you know that the defendant in this case says that at the personal appearance that he had with the local board on December 4, 1951, he offered some things to the board and the board received some but wouldn't receive others? Do you know that he claims that? A. Well, does he?

(Testimony of Andrew K. Pattison.)

Q. I am asking you if you know that is a claim that he is making?

A. I believe Mr. Mitsumori made that statement, yes.

Q. You knew when you came here that he claimed some things were accepted by the board and other things were refused by the board?

A. Yes.

Q. Isn't it a fact that at this particular meeting one of your board members named Pattison did almost all the talking?

A. I don't believe that is a fact, no. In fact, it is not a fact, I will say that.

Q. At this particular meeting? [88]

A. That's right, or at any meeting, do I do all the talking.

Q. I am sorry. You are Mr. Pattison.

A. Yes, sir.

Q. I take all that back. I didn't mean you. So far you gentlemen are just names to me and I got my notes switched. I am referring to Mr. Tippet, T-i-p-p-e-t. What I asked you about Mr. Pattison I mean to refer to Mr. Tippet. Isn't it a fact that at this meeting he did most of the talking?

A. At this meeting, I wouldn't say, but I will go back to generally again. Generally he doesn't. When Mr. Douglas is there, he was the chairman. He is not on the board any more, but at this time he was.

Q. Who isn't on the board any more?

(Testimony of Andrew K. Pattison.)

A. Mr. Douglas.

Q. Who is the chairman now?

A. Right now I am acting as chairman.

Q. Did Mr. Pattison at that time have three sons in the service? A. He did not.

The Court: This is Mr. Pattison.

The Witness: I only had one in the service.

Q. (By Mr. Tietz): Did Mr. Tippet at that time have three sons in the service? [89]

A. I can't tell you whether he did or not.

Q. Have you ever heard him make such a statement?

A. I think all of us had sons in the service. At least I had one, and I am sure Mr. Tippet had one and I think Mr. Douglas did, but I can't tell you how many. I don't know.

Q. Was anything said at this meeting about Jehovah's Witnesses and the Flag salute?

A. I couldn't say.

Q. Do you recall at about this time there was another Ashauer that had a hearing before your board somewhat similar to this one, that it was an appearance before the local board?

A. I don't recall the names. I would have to check the records to see if that is the case.

Q. If I were to tell you that this defendant Bernard Ashauer has a brother named Rex Ashauer and he had an appearance before the local board a couple of months after this one, would that refresh your recollection? A. No, it wouldn't.

Q. Has there ever been a time when your board

(Testimony of Andrew K. Pattison.)

wouldn't let the registrant proceed to read from the Bible he said he wanted to read, or to present books he said he wanted to present?

A. No, I don't believe so. We generally encourage them to present all the things they can, but I don't believe [90] we ever stopped them from stating their story.

The Court: Do you limit them as to time?

The Witness: I mean we don't stay there all day, no. If they got off the subject, no, but we generally give as much as an hour. We have had them as long as an hour, I know that.

The Court: If a man comes in and wants to read to you portions of the Scriptures he thinks are pertinent, do you sit there and let him read as long as he wants to read?

The Witness: No, not as long as he wants to. We would stop him if he started on some sort of reading books like that. Naturally, we would stop them. But we generally let them—if there is any short paragraph in some book they want to read, we let them read it. We wouldn't take the time to read a whole book, no.

Q. (By Mr. Tietz): Have you looked at the records that you are required to keep, your office is required to keep, of what happened on this day?

A. No, I haven't. I haven't had time to go over this file. I didn't know anything about this until last night. I just got here about 15 minutes before court. I haven't had time to get it.

Q. Have you any way of knowing how many

(Testimony of Andrew K. Pattison.)

registrants you heard on these appearances before the local board on this day, December 4, 1951?

A. No. I would not know without checking. [91]

Q. Do you know whether you set any arbitrary time limitation on these appearances on this day?

A. No, I wouldn't.

Q. Do you know whether or not you set any arbitrary, meaning a definite time limitation on this particular defendant on this day? A. No.

Q. Do you mean, as far as you can recall, if he wanted to discuss the matter for an hour, you would have given him as much as an hour?

A. We have given registrants as much as an hour, that is correct.

Q. Is that true, that you have given them as much as an hour on days when you have had, say, as many as ten, or a considerable number?

A. No. You would know that we wouldn't be there ten hours.

Q. What is the most you have ever been at these personal appearance hearings, how many hours at a stretch?

A. You mean for appearances only?

Q. Yes, solely for that.

A. Oh, possibly four hours.

Q. Is that the maximum that you have handled these appearances in any one day?

A. We stay until we get through. We get there about [92] 9:00 o'clock in the morning. We leave when we get finished. Whether it is 11:00 o'clock, 12:00 o'clock or 2:00 o'clock, or whatever time it is.

(Testimony of Andrew K. Pattison.)

Q. Have you any way of telling, by looking at your records, how much time was given to this particular defendant? A. No, I don't believe so.

Q. For all you know, it might be rather short?

A. It could have been.

Q. If he wanted to discuss what was already in the file, could you have said to him, "We know that. Just give us something new"?

A. I don't believe so, no.

Q. What is your procedure when a registrant wants to go over a matter that is already in the file?

A. Should I say what our procedure is generally?

The Court: That is the question.

Mr. Tietz: I am opening the door.

The Witness: What was it again?

Mr. Tietz: I beg your pardon?

The Witness: What was the question, now?

Mr. Tietz: Will you please read it?

The Court: Read the question.

(Question read.)

The Witness: Well, I don't know exactly what you mean by that. If he already has a letter in there, and you mean [93] to allow him to read it again, is that what you mean?

Q. (By Mr. Tietz): No. Suppose he comes to you and he says, "You gave me a 4-E on the basis of what I told you on Form 150 and all the other material, and now all of a sudden, out of a clear

(Testimony of Andrew K. Pattison.)

sky, you give me a 1-A. What is the matter with my material? I feel the same way." What do you do then?

A. Well, then we check it over. We would.

Q. Will you check over this file and will you see if he has something in there on which you changed him from the 4-E to the 1-A?

Mr. Mitsumori: I will object to that question.

The Court: Sustained.

Mr. Tietz: Your Honor——

The Court: I don't think it makes any difference. I think the board has the right to change the classification any time.

Mr. Tietz: No, your Honor. I think if he, on the basis of some fact that is not a fact, he says that is the reason——

The Court: Objection sustained. I don't think it is material.

Q. (By Mr. Tietz): Are you able to tell us at this time why this registrant was changed from 4-E to 1-A?

Mr. Mitsumori: Same objection, your Honor.

The Court: Same ruling. The cases point out and the [94] regulations point out that it is the duty of the board to keep acquainted with the files, to go over the files, and if there is a change of condition, either by the registrant himself, or some other change, they can reclassify. Now, after reclassification, the registrant has a right to come in and qustion the reclassification. I don't think he has a right to question why.

(Testimony of Andrew K. Pattison.)

Q. (By Mr. Tietz): Do you recall that this registrant came in and questioned the change from 4-E to 1-A? A. No.

Q. You don't recall that?

A. I am sorry, but I can't remember something that took place two years ago.

Q. I agree with that.

A. My memory isn't that good.

Mr. Mitsumori: I believe Mr. Pattison has testified he could not recall the details of that particular personal appearance, because he had held so many during the course of the 5-year period, and therefore, he was merely testifying as to the general practice and procedure.

The Witness: That's all I can do. I can't remember each individual one. I don't believe anybody else could.

Q. (By Mr. Tietz): Records are kept of what is done, are they not?

A. That's right. That is the only thing I could go by [95] in this case.

Q. Aren't there records, in addition to what you have before you?

A. No. We have no secret records.

Q. Don't you have minutes of the meetings?

A. It is right in there. Anything that pertains to the meeting is in the file.

Q. Am I to understand you do not keep a Form 112 minutes, other than the minutes that are on the back of page 8?

(Testimony of Andrew K. Pattison.)

A. Not unless the office does. Our file is all we go by.

Q. Don't you know that the regulations require that? You mean if there are such records, you don't know?

A. Yes, I guess that is the answer.

Mr. Tietz: That's all. You may examine.

The Witness: Are you through with me?

Mr. Mitsumori: No. Does your Honor wish to question the witness?

The Court: No. I am through. May this witness be excused?

Mr. Tietz: Yes, except I desire to put the defendant back on for rebuttal.

The Court: Maybe you had better stay here until after we have the defendant on the stand. It might refresh your [96] recollection.

(Witness withdrawn.)

BERNARD HENRY ASHAUER

recalled as a witness in his own behalf in rebuttal, was examined and testified as follows:

Direct Examination

By Mr. Tietz:

Q. You have heard the testimony of the board member, Mr. Pattison, about the conduct of the appearance before the local board given you on December 4, 1951? A. That is correct.

Q. Do you recollect Mr. Pattison being at that meeting? A. Yes.

(Testimony of Bernard Henry Ashauer.)

Q. Do you recollect what part, if any, he took in the discussion?

A. Well, of the three board members, the one that did all the talking, I would say, not all, but—well, most of it, was Mr. Tippet.

Q. How much part did Mr. Pattison take in it?

A. Well, he asked a few questions, and Mr. Douglas asked a few questions, but actually most of the speaking was done by Mr. Tippet. [97]

Q. Did Mr. Douglas or Mr. Pattison exhibit any animosity of any kind toward you?

A. What do you mean by "animosity"?

Q. Did they have an attitude antagonistic to you?

A. No, those two were pretty good at the board.

Q. Did anybody there exhibit any attitude of antagonism to your ideas or beliefs?

A. Yes, Mr. Tippet.

Mr. Tietz: That's all.

The Court: Any questions?

Mr. Mitsumori: I have no further questions.

The Court: You may step down.

(Witness excused.)

Mr. Tietz: The defense rests, your Honor.

Mr. Mitsumori: The government rests, your Honor.

(Argument.)

The Court: There is nothing for me to do except to hold this defendant guilty, and I will so hold. Now you have a case in which you can test out the legality of the Lynch case, if you so desire.

Mr. Tietz: I presume that the Court will permit the defendant to remain on the same bond pending determination of the appeal? [98]

The Court: Well, I will allow the defendant to remain on bond until it is determined whether you want to appeal and file your notice of appeal, and at that time I will entertain a motion for him to remain on bond until the determination of the appeal.

Mr. Mitsumori: Is the court going to set a date for sentence?

The Court: Yes. I will set a date for the sentence. How long will it take you to perfect your appeal, if you decide to appeal?

Mr. Tietz: Well, it takes only a day to prepare the notice, your Honor.

The Court: Of course, you can't appeal until a judgment has been entered. I find the defendant guilty. Since this is a case without a jury, I think a judgment should be entered.

Mr. Tietz: I am satisfied that there is no reason the court can't proceed to pronounce judgment today. I don't think a probation report would be of any assistance to your Honor in this case.

The Court: I am not going to refer him to the probation department, because I assume this defendant doesn't have any past record, that he has a good record for being a law-abiding citizen, and the only thing against this defendant at this time is his religious belief in refusing to be inducted. [99]

Mr. Tietz: I am satisfied myself that is 100 per cent correct.

The Court: I am giving the defendant the benefit of all doubt. I am making it 100 per cent as far as past record is concerned.

Mr. Tietz: Could the court then at this time consider the matter of judgment and hear me on the argument for probation.

The Court: I will hear you.

(Discussion of counsel.)

The Court: Well, I am sorry, Mr. Tietz, but I just don't see how I can grant probation in any of these cases. That includes your cases, as well as the others. If this is an application for probation, it is denied. I will ask the United States Attorney about filing a formal judgment in this case. The defendant is ready to be sentenced. Can he be sentenced before a formal judgment is filed?

Mr. Mitsumori: Yes, your Honor. He can waive probation hearing.

The Court: He has made an application for probation and I have denied the application.

Mr. Mitsumori: It seems to me the court can pass judgment at this time.

The Court: I don't think there is anything to be gained [100] by postponing judgment. This matter is important enough to get it to the Circuit and the sooner I pronounce judgment, the sooner it will go to the Circuit.

It is the judgment of this court you be committed to the custody of the Attorney General for three years. My recommendation is you be sent to the work camp at Tucson, Arizona.

Mr. Tietz: Will the court entertain an oral motion for bail pending appeal? There is $2,500 bond, and that is more than enough. He can get the same people.

The Court: I will allow him to remain on present bail until your notice of appeal has been filed. I don't think you can make an application for a bond on appeal until you have filed your notice of appeal.

Mr. Tietz: That may be technically correct.

The Court: So I will allow him to remain on bond until you file the notice, and when you file your notice, you come back in and I will pass on it at that time. I will stay the execution until after the notice of appeal has been filed, and after your application for bail pending appeal, provided it does not extend beyond November 23rd. That gives you two weeks and a half.

Mr. Tietz: I must get the notice in within 10 days, and I will make it in 2 days.

The Court: Then you can make the application for bail pending appeal. [101]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 31st day of December, A.D. 1953.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed March 22, 1954. [102]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain the original Indictment, Waiver of Jury, Stipulation, Judgment and Commitment, Notice of Appeal, Two Orders Extending Time to Docket Appeal and Designation of Record on Appeal, and a full, true and correct copy of Minutes of the Court for August 10, 1953; October 26, 1953; November 3 and 5, 1953, which, together with original Exhibits Plaintiff's No. 1 and Defendant's A to E, inclusive, and reporter's transcript of proceedings on September 23, 1953; October 26, 1953, and November 3 and 5, 1953, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 1st day of April, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14304. United States Court of Appeals for the Ninth Circuit. Bernard Henry Ashauer, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 5, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14304

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class 1-A.

II.

The report of the hearing officer of the Department of Justice and the recommendation of the Assistant Attorney General to the appeal board (that appellant be denied his conscientious objector status because of his belief in self-defense), were arbitrary, capricious and based on artificial and irrelevant grounds, contrary to the act and regulations.

III.

The appellant was denied the right to a full and fair hearing upon the occasion of the personal appearance before the local board in that he was denied the right to file a classification and offer new and additional evidence to the board and because the board demonstrated its prejudice against him.

IV.

The selective service system lost jurisdiction to order him to report for induction because it reclassified him into Class 1-A, on November 20, 1951, from the deferred class IV-E, without any new evidence to give it jurisdiction to act.

V.

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the bona fides of appellant's conscientious objector claim.

VI.

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

VII.

The Department of Justice and the board of appeal deprived the defendant of his procedural rights

United States Court of Appeals
for the Ninth Circuit

No. 14304

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VII.

The Department of Justice and the board of appeal deprived the defendant of his procedural rights

to due process of law. This the Department of Justice did by not mailing a copy of its recommendation to the defendant and giving him an opportunity to answer the adverse recommendation before forwarding it to the appeal board. The appeal board did this by considering the final classification of the defendant without sending to him a copy of the unfavorable departmental recommendation and giving him opportunity to answer it before it denied the conscientious objector status.

/s/ J. B. TIETZ,
Attorney for Defendant.

[Endorsed]: Filed April 15, 1954.
Affidavit of Service by Mail attached.

No. 14163

United States Court of Appeals

FOR THE NINTH CIRCUIT.

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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Counsel for Appellant

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No. 14163

United States Court of Appeals

FOR THE NINTH CIRCUIT.

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [9][1]

[1] Numbers appearing in brackets herein refer to pages of the printed Transcript of Record, except when "F" precedes the numbers. In that event the numbers appearing within brackets refer to the draft board file, received in evidence and marked as Government's Exhibit 1. Papers in the draft board file are numbered by a written longhand figure which is encircled.

The district court made no specific findings of fact. The trial court found appellant guilty. [94] Title 18, Section 3231, United States Code confers jurisdiction in the United States District Court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure.

The notice of appeal was filed in the time and manner required by law. [11] The statement of points has been duly filed.

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified he was ordered to report for induction. It was then alleged that after reporting for induction he "knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty. He waived the right of trial by jury. [4] Findings of fact and conclusions of law were also waived. [4-5]

After receiving evidence and hearing testimony at the trial the court considered argument of counsel and reasons for judgment of acquittal. [15-23, 40-44] The court concluded that no reason existed why appellant should be acquitted. It stated the reason for concluding that appellant was guilty. [15-23, 40-44] It found appellant guilty. [94] Appellant was sentenced to serve a period of three years in the custody of the Attorney General. [9-10, 96] The transcript of the record (including the statement of points relied upon) has been timely filed in this Court.

THE FACTS

Bernard Henry Ashauer was born August 27, 1930. [F 1] He registered with his local board on September 17, 1948. [F 1] His classification questionnaire was mailed to him on September 16, 1949, and he returned it on September 22, 1949. [F 3-4] He showed his employment with General Motors plant at Van Nuys, California. [F 7] He completed six years elementary schooling, two years junior high schooling and four years high schooling and was graduated. [F 9] He signed Series XIV certifying that he was a conscientious objector. [F 10]

The local board mailed the special form for conscientious objector to him on December 28, 1950. [F 11, 14] He filed the form on January 7, 1951. [F 14] He signed series I(B) certifying that he was opposed to his participation in both combatant and noncombatant military service. [F 14] He stated that he believed in the Supreme Being and described the nature of his belief that imposed obligations higher than those owed to the state. [F 14] He received his religious training since childhood. [F 15] He relied on the Bible as his guide and said his teachers were Jehovah God and Christ Jesus. [F 15] He said he believed in the use of force for self-defense. [F 15]

He referred to his attendance at Bible meetings and distribution of Bible literature as the actions in his life demonstrating the depth of his religious convictions. [F 15] He had given public expression to his views as a conscientious objector. [F 15] He gave his general background, listing schools attended, employment and residences. [F 15-16] He stated his parents were Jehovah's Witnesses. [F 16] He stated he had never belonged to any military organization but was a member of a religious organization: Jehovah's Witnesses. He was reared as one of Jehovah's Witnesses. [F 16] He said the organization had no creed but having been consecrated to the service of God he was opposed to participation in war and must remain entirely neutral when nations of the world are involved. [F 16] He could

not fight for any nation against another. [F 16] Jehovah's Witnesses are neutral regardless of what nation they reside in. [F 16] He gave references and signed the certificate at the end of the form. [F 17]

He filed along with the special form for conscientious objector a two-page statement in which he gave his background and showed that he was enrolled in the Theocratic Ministry School. He quoted extensively Scriptural statements supporting his conscientious objector stand. He stated he must obey God rather than man. [F 18-19] He also filed at the time a booklet entitled "God and State" and the magazine, *The Watchtower,* for February 1, 1951. This magazine described in detail the views of Jehovah's Witnesses in respect to participation in war. [F 21]

The local board placed him in Class IV-E on January 16, 1951. [F 11] Ten months later, without any change in his status, he was taken out of the conscientious objector class and placed in Class I-A. [F 11] He appealed in writing and requested a personal appearance to discuss his claim for classification as a conscientious objector. In the letter he argued his case extensively. [F 11, 22-23]

He had a personal appearance on December 4, 1951. A memorandum was made by the board. [F 11, 25] He was again classified in I-A on December 4, 1951. [F 11] He appealed and filed numerous affidavits supporting his conscientious objector claim in every detail. [F 26-35] The appeal board reviewed the file and made a determination that required a reference of the case to the Department of Justice for appropriate inquiry and hearing. [F 11] The file was sent to the Depratment of Justice. [F 36]

There was a secert investigation conducted by the FBI. A hearing before a hearing officer of the Department of Justice was had. [F 39-40] Thereafter the Department of Justice at Washington wrote a letter of recommendation to the appeal board. This recommendation did not refer to any evidence that contradicted or impeached the sincerity of appellant's claim as a conscientious objector. The

Department's recommendation against the conscientious objector claim was solely because appellant believed in the use of force for self-defense and because the Department of Justice considered that the views expressed in the February 1, 1951, issue of *The Watchtower* concerning his belief in Theocratic warfare proved that he was not a conscientious objector. Mr. T. Oscar Smith, Special Assistant to the Attorney General, writing for the Department of Justice, recommended to the appeal board that the claim for exemption from combatant and noncombatant military service be denied. [F 39-40]

The appeal board accepted the recommendation, denied the conscientious objector claim and placed appellant in Class I-A. [F 41] This classification made him liable for unlimited military service. The appeal board returned the file to the local board and notice of classification was mailed to appellant on November 19, 1952. [F 11] Appellant was thereupon ordered to report for induction. [F 11, 42] Appellant reported for induction on December 8, 1952, but refused to submit to induction. [F 11, 46-49]

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed appellant possessed conscientious objections to participation in both combatant and noncombatant military service. His objections were based upon his sincere belief in the Supreme Being. His obligations to Jehovah God are superior to those owed to the state. They are above those flowing from any human relation. His beliefs are not the results of political, philosophical or sociological views. They are based solidly upon the Word of God. [F 12, 14-23, 26-35]

The local board classified him in Class I-A. [F 11] He appealed and there was a Department of Justice hearing. The Assistant Attorney General made a recommendation to the appeal board. He found appellant to be sincere in his beliefs as a conscientious objector. [F 39-40] He recom-

mended against classifying appellant as a conscientious objector. [F 39-40] The appeal board denied the conscientious objector status. [F 41]

Upon the oral argument it was urged that there was no basis in fact for the classification given by the local board.

The question presented here, therefore, is whether the denial for classification as a conscientious objector was arbitrary, capricious and without basis in fact.

II.

The file of appellant was referred to the Department of Justice pursuant to the Selective Service Regulations and Section 6(j) of the Universal Military Training and Service Act. There was a hearing held before a hearing officer. A report was made to the Department of Justice. [F 39-40]

The Assistant Attorney General made a recommendation to the appeal board based on the report of the hearing officer. [F 39-40]

The Assistant Attorney General held in his recommendation that the belief of appellant in the right of self-defense was enough to defeat his conscientious objector status. He recommended, that since appellant believed in theocratic warfare he was not a conscientious objector. The recommendation to the appeal board was that even though appellant was a sincere Jehovah's Witness he was not entitled to be classified as a conscientious objector. [F 39-40]

This point was specifically raised in the argument before the trial court. [20-21, 40-42]

The question presented, therefore, is whether the recommendation of the Department of Justice to the district appeal board was arbitrary, capricious and based upon artificial, irrelevant and immaterial grounds as to what constitutes a conscientious objector so as to destroy the appeal board classification.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to acquit the appellant as requested at the close of all the evidence.

II.

The district court erred in convicting appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT ONE

The appeal board had no basis in fact for the denial of the claim made by appellant for classification as a conscientious objector and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war, both combatant and noncombatant. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God higher than those to the state. The evidence showed that his beliefs were not the result of political, sociological or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that

the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses.

The local board accepted appellant's testimony. It is undisputed. Notwithstanding the undisputed evidence in his file, the local board and the district appeal board classified appellant I-A and held that the appellant was not entitled to the conscientious objector status.

The Supreme Court of the United States in *Dickinson* v. *United States* held that the "dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."—*Dickinson* v. *United States,* 346 U. S. 389, 74 S. Ct. 152 (Nov. 30, 1953).

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*Jewell* v. *United States,* 6th Cir. Dec. 22, 1953, 208 F. 2d 770; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *United States* v. *Alvies,* N. D. Cal. S. D., May 28, 1953, 112 F. Supp. 618; *United States* v. *Graham,* W. D. Ky., 1952, 109 F. Supp. 377, 378; *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Weaver* v. *United States,* 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Lowe* v. *United States,* 8th Cir., Feb. 19, 1954, 210 F. 2d 823; *Pine* v. *United States,* 4th Cir., Apr. 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Hagaman,* 3d Cir., May 13, 1954, — F. 2d —; *United States* v. *Rodriguez,* D. P. R., Feb. 24, 1954, 119 F. Supp. 111; *United States* v. *Lowman,* W. D. N. Y., Jan. 15, 1954, 117 F. Supp. 595; *United States* v. *Benzing,* W. D. N. Y., Jan. 15, 1954, 117 F. Supp. 598; *United States* v. *Close,* 7th Cir., June 10, 1954, — 2d —.

POINT TWO

The recommendation to the appeal board by the Department of Justice is arbitrary and capricious and is based on artificial, irrelevant and immaterial elements as to what constitutes a conscientious objector.

The uncontradicted record shows that the report of the hearing officer and the recommendation of the Department of Justice to the appeal board were adverse to appellant. The sole and only reason for the recommended denial of the conscientious objector claim was that appellant believed in self-defense and theocratic warfare notwithstanding his opposition to the participation in war between the nations of this world. This recommendation for the denial of the conscientious objector claim was based on artificial, irrelevant and immaterial elements foreign to the statutory definition of conscientious objection. The recommendation of the Assistant Attorney General was, therefore, illegal. The appeal board accepted the recommendation and denied appellant his claim for classification as a conscientious objector. Reliance upon the recommendation that was defective destroyed the proceedings.

It is the settled opinion among the Courts of Appeals that have had an opportunity to write on the subject that belief in self-defense and theocratic warfare is no basis for denial of the conscientious objector claim.—*Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953; 208 F. 2d 329; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —.

A recommendation to the appeal board based on this artificial standard invalidates the proceedings.—See *Taffs* v. *United States, supra;* compare *Annett* v. *United States, supra.*

When the chain of proceedings in the Department of

Justice is so illegal that it cannot stand by itself, the entire administrative chain is broken. The illegality of the Department of Justice proceedings makes invalid the entire draft board proceedings.—See *United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128; *United States* v. *Romano* S. D. N. Y., 1952, 103 F. Supp. 597; *United States* v. *Bouziden,* W. D. Okla., 1952, 108 F. Supp. 395; see also *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689.

It is submitted that the recommendation by the Department of Justice to the appeal board is illegal, arbitrary, capricious and jaundiced, and destroyed the appeal board classification upon which the order to report for induction was based.

ARGUMENT

POINT ONE

The appeal board had no basis in fact for the denial of the claim made by appellant for classification as a conscientious objector and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service

because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participa-

> tion in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. § 456(j), 65 Stat. 83.

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal moral code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the appellant. The local board and the appeal board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of military machinery.

The undisputed documentary evidence in the file before the appeal board showed that the appellant was conscientiously opposed to participation in combatant and noncombatant military service. He showed: (1) he believed in the Supreme Being, (2) he was opposed to participation in combatant and noncombatant military service, (3) he based his belief and opposition to service on religious

training and belief as one of Jehovah's Witnesses, (4) such stand did not spring from political, sociological or philosophical beliefs. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

It has been held by many courts of appeals that the rule laid down in *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1953) holding that if there is no contradiction of the documentary evidence showing exemption as a minister that there is no basis in fact for the classification also applies in cases involving claims for classification as conscientious objectors.—*Weaver* v. *United States,* 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —; *contra United States* v. *Simmons,* 7th Cir., June 15, 1954, — F. 2d —.

Recently in *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —, after quoting from *Dickinson* v. *United States,* 346 U. S. 389, the court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeal.

In those cases the appellants, like appellant here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. For instance, see *Jessen* where the Tenth Circuit (after following *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of the courts with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —. And these cases ought not to be pushed aside on the specious but factitious ground that, because the courts in some of those cases discussed the speculations urged on the courts as basis in fact, the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case insofar as the statements in the draft board record showing conscientious objection are concerned.

It is respectfully submitted that the motion for judgment

of acquittal should have been sustained because there is no basis in fact for the classification given by the draft boards and the denial of the conscientious objector classification was arbitrary and capricious. The judgment of the court below should be reversed, therefore, and the trial court directed to enter a judgment of acquittal.

POINT TWO

The recommendation to the appeal board by the Department of Justice is arbitrary and capricious and is based on artificial, irrelevant and immaterial elements as to what constitutes a conscientious objector.

The undisputed evidence shows that the recommendation of the Department of Justice to the appeal board was accepted by the appeal board. The appeal board acted upon it. The recommendation incorporated into it and made a part of it foreign and irrelevant and immaterial considerations as to what constitutes a conscientious objector. The recommendation of the Department was based on appellant's belief that theocratic warfare was proper. He was not, therefore, conscientiously opposed to participation in wars between the nations of this world as a combatant and noncombatant soldier. This type of recommendation has been condemned.—*Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 329; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366. Compare *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *Jessen* v. *United States,* 10th Cir., May 7, 1954 —F. 2d—.

The recommendation of the Department of Justice was illegal. It became a chain in the administrative proceedings

when the appeal board classified appellant in the manner that the Assistant Attorney General recommended. The classification by the appeal board was an adoption of the recommendation by the Department of Justice. The illegal defect in the recommendation tainted the entire proceedings in the draft boards and made them illegal after the recommendation was filed with the appeal board.

It is apparent that the conclusion reached by the hearing officer, after finding as a fact appellant to be a conscientious objector, was arbitrary and capricious because the basis for the rejection of appellant's evidence was on illegal and irrelevant grounds.—*Linan* v. *United States,* 9th Cir., 1953, 202 F. 2d 693.

The report of the hearing officer was adopted by the Department of Justice in its recommendation. The appeal board followed the recommendation of the Department of Justice. While the recommendation was only advisory, the fact is that it was accepted and acted upon by the appeal board. The appeal board concurred in the conclusions reached by the hearing officer and the Department of Justice. It gave appellant a I-A classification and denied him the conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error. —See *United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128.

It is respectfully submitted that the recommendation by the Assistant Attorney General to the appeal board, which was accepted by the board, is illegal, arbitrary and capricious, and jaundiced and destroyed the appeal board classification upon which the order to report for induction was based.

CONCLUSION

Wherefore appellant prays that the judgment of the court below be reversed and the cause remanded with directions to grant the motion for judgment of acquittal.

Respectfully,

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Brooklyn 1, New York

Counsel for Appellant

July, 1954.

No. 14304

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on July 22, 1953, under Section 462 of Title 50, Appendix, United States Code, for refusing to submit to induction into the armed forces of the United States. [R. pp. 3-4.][1]

On August 10, 1953, the appellant was arraigned, entered a plea of Not Guilty, and the case was set for trial on August 25, 1953.

On October 26, 1953, trial was begun in the United States District Court for the Southern District of California before the Honorable Harry C. Westover, without

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[1]"R." refers to Transcript of Record.

a jury, and on November 5, 1953, the appellant was found guilty as charged in the indictment. [R. pp. 9-10.]

On November 5, 1953, appellant was sentenced to imprisonment for a period of three years, and judgment was so entered. [R. pp. 9-10.] Appellant appeals from this judgment. [R. p. 11.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, Appendix, United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

STATUTES INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment—No. 23002-CD (Criminal) [U. S. C., Title 50, App., Section 462—Universal Military Training and Service Act].

"The grand jury charges:

"Defendant BERNARD HENRY ASHAUER, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 83, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on December 8, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [R. pp. 3-4.]

On August 10, 1953, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable Harry C. Westover, United States District

Judge, and entered a plea of Not Guilty to the offense charged in the Indictment.

On October 26, 1953, the case was called for trial before the Honorable Harry C. Westover, United States District Judge, without a jury, and on November 5, 1953, the appellant was found guilty as charged in the Indictment. [R. pp. 9-10.]

On November 5, 1953, appellant was sentenced to imprisonment for a period of three years in a penitentiary. [R. pp. 9-10.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to acquit the appellant as requested at the close of all the evidence.

B. The District Court erred in convicting appellant and entering a judgment of guilty against him.

IV.

STATEMENT OF THE FACTS.

On September 17, 1948, Bernard Henry Ashauer registered under the Selective Service System with Local Board No. 83, North Hollywood, California.

On September 22, 1949, the appellant filed with Local Board No. 83 SSS Form 100, Classification Questionnaire. He stated that he worked approximately 40 hours per week on the production line of General Motors and expected to continue to do so indefinitely. The appellant

signed Series XIV and thus informed the local board that he claimed exemption from military service by reason of conscientious objection to participation in war. He also requested further information and forms.

SSS Form 150, Special Form for Conscientious Objector, was furnished to the appellant and he completed this form and filed it with the local board. The appellant claimed to be conscientiously opposed to participation in war in any form and opposed to participation in noncombatant training or service in the armed forces, by reason of his religious training and belief.

On January 16, 1951, the appellant was classified in Class 4-E, and was reclassified in Class I-A on November 20, 1951.

On November 28, 1951, the appellant requested a personal appearance before the board and was granted such personal appearance on December 4, 1951.

On December 13, 1951, the appellant filed Notice of Appeal from his classification to the Appeal Board.

On November 17, 1951, the Appeal Board classified the appellant in Class 1-A. Form 110, Notice of Classification, was mailed on November 19, 1952, to the appellant.

On November 21, 1952, SSS Form 252, Order to Report for Induction, was mailed to the appellant, ordering him to report for induction on December 8, 1952. The appellant reported for induction but refused to submit to induction into the armed forces of the United States.

V.

ARGUMENT.

POINT ONE.

The Board of Appeals Had Basis in Fact to Classify the Appellant in Class I-A and Its Action Was Neither Arbitrary nor Capricious.

The classification of registrants by Local Boards and Appeal Board is provided by 50 U. S. Code, Appendix, Section 460, which provides in pertinent part:

> ". . .
>
> "(b) The President is authorized—
>
> "(3) to create and establish . . . civilian local boards, civilian appeal boards, . . . Such local boards . . . shall, under the rules and regulations prescribed by the President, have the power . . . to hear and determine . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President . . ."

The appeal board has jurisdiction, thus, to hear appeals and classify anew.

32 C. F. R., Sec. 1626.26—Decision of Appeal Board—provides:

> "(a) The appeal board shall classify the registrant, giving consideration to the various classes *in*

the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be *final,* except where an appeal to the President is taken: Provided, That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper cause under the provisions of Part 1625 of this chapter." (Emphasis added.)

The classifications of the local boards and later the appeal boards made in conformity with the regulations are *final* even though erroneous. The question of jurisdiction arises only if there is no basis in fact for the classification.

Estep v. United States, 327 U. S. 114;

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.);

United States v. Del Santo, 205 F. 2d 429 (7th Cir.).

The statute granting the exemption reads as follows:

"Title 50, App., United States Code, Section 456—Deferments and exemptions from training and service.

. . . . . .

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training

and belief, is conscientiously opposed to participation in war in any form. . . ."

Selective Service Regulations, Section 1622.11 [32 C. F. R. 1622.11] provides:

"§1622.11—Class I-A-O—*Conscientious objector available for non-combatant military service only.*

"(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

"(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

" 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code.' "

Selective Service Regulations, Section 1622.14 [32 C. F. R. 1622.14] provides:

"§1622.14—Class I-O—*Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*

"(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and non-combatant training and service in the armed forces."

An exemption from military service is a privilege granted by Congress. It is not a right guaranteed to any person, and should be strictly construed against a claimant. Unless the claimant establishes his eligibility by clear and convincing proof, he should not be granted a conscientious objector exemption.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Thus, such a registrant must satisfy the Selective Service Board as to the validity of his claim for exemption in the following particulars:

(1) He must be conscientiously opposed to war in any form; and

(2) This opposition must be by reason of the registrant's religious belief and religious training; and

(3) The registrant must make a timely, sincere, and good faith claim; and

(4) The registrant must be conscientiously opposed to combatant and/or noncombatant training and service.

These tests recognize that conscientious objection claims concern a state of mind of an individual. It is an intangible, and as such difficult to ascertain objectively, as compared with a ministerial claim (Class 4-D).

In *United States v. Simmons,* Case No. 11011, 7th Cir., June 15, 1954, ... F. 2d ....., the court states:

> ". . . thus, a distinction must be drawn, we believe, between a claim of ministerial status and a claim of conscientious objection status as to susceptibility of proof. Whether a registrant is a minister in the statutory sense, having as a principal vocation the leadership of and ministering to the followers

of his creed, is a factual question susceptible of exact proof by evidence as to his status within the sect and his daily activities. No search of his conscience is required. Even though the only tenet of his cult be a belief in war and bloodshed, he still would be exempt from military service if he were, in fact, a minister of religion. Is he affiliated with a religious sect? Does he, as his vocation, represent that sect as a leader ministering to its followers? These questions are determinative and subject to exact proof or disproof.

"The conscientious objector claim admits of no such exact proof. Probing a man's conscience is, at best, a speculative venture. No one, not even his closest friends and associates, can testify to a certainty as to what he believes and feels. These at most, can only express their opinions as to his sincerity. The best evidence on this question may well be, not the man's statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact finding agency. We cannot presume that a particular classification is based on the board's disbelief of the registrant, but, just as surely, the statutory scheme will not permit us to burden the board with the impossible task of rebutting a presumption of the validity of every claim based ofttimes on little more than the registrant's statement that he is conscientiously opposed to participation in war. When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption we may not inquire further as to the correctness of the board's order."

Accord: *United States v. Sicurella,* Case No. 11012, 7th Cir., June 15, 1954, ... F. 2d .....

Appellant was granted a personal appearance before the local board on December 4, 1951, a hearing before hearing officer Nathan O. Freedman on August 25, 1952, and the appellant testified on his own behalf before Judge Westover on several occasions in the course of the trial in the District Court. [R. pp. 25-40, 62-71.]

On each of the occasions above, appellant's claim for a conscientious objection exemption was denied.

Furthermore, judicial review of the administrative action was accorded to the appellant in the District Court trial. Once again, the trier of the facts was able to observe the demeanor, sincerity and credibility of the witness-appellant when the appellant took the witness stand on his own behalf. [R. pp. 25-40, 62-71.] A reading of the transcript of record indicates that the appellant did not pursue his claim in good faith. His testimony lacked truthfulness in that the appellant's accusations of bias and prejudice on the part of the local board were determined to be unfounded. [R. p. 26.]

> "Q. Tell me this, in discussing the file, that is, in discussing your file, tell me this, did you try to discuss the contents of your file with them and point out certain things to them? A. Yes, I did.
>
> Q. Did they let you do it? A. No, they didn't."

On cross-examination, Transcript of Record, page 31:

> "Q. Did they give you an opportunity to expound your views? A. Yes, to a certain extent they did."

And on page 33:

> "Q. Isn't it a fact that at that hearing you had an opportunity to present additional evidence? A. All I could present was three pieces of paper that, you know, that people would write concerning my

behavior in my company, and so forth, and that's all they would take.

Q. Weren't there four letters, one from Mr. Floyd Kite, Jr.? A. Yes."

* * * * * * * *

[R. p. 35]:

"Q. Mr. Ashauer, I have got this photostatic copy of your file. Let me show you pages 20 and 21. This appears to be a pamphlet of the Jehovah's Witness sect, is that correct? A. That is correct.

Q. On page 21, here is another pamphlet, known as The Watchtower. A. That's right.

* * * * * * * *

The Witness: Well, as I recollect now, they were willing to take this particular magazine, too, because it is a thin magazine and it doesn't take up too much space, and it is Why Jehovah's Witnesses are not Pacifists. They were willing to take this one here, because it is a small booklet. The others they refused to take because they took up too much space in the file.

Q. (By Mr. Mitsumori): How many pages were the other pamphlets you had submitted? A. Oh, maybe 30 pages in the book, just a small one, and the other might have been 18 or 20.

Q. Contrary to the statement you gave on direct examination, they did give you an opportunity to present these two pamphlets? A. Well, after I told them I was going to call up or I was going to write, and then when they heard that, they figured they'd better take some, so they did take some, those two pamphlets, or maybe three or four. I am not positive what it was."

The appellant was inconsistent in his beliefs in that, on page 15 of Government's Exhibit No. 1, he stated that he would use force when his self-defense was involved. However, on cross-examination, the appellant stated that he would not participate or defend his own sect even if theocratic warfare were involved. Transcript of Record, page 37, states:

> "Q. In other words, if, for example, if I may put it this way to you, if Communists attempted to destroy Jehovah's Witnesses, would you take arms to combat them, to combat such a force as Communism to preserve the state of Jehovah? A. No, sir, I wouldn't. The only time you could do that would be, if you know the Bible back there in the time when the Israelites were the chosen people, they had a right to defend themselves because they were ruled by God, theocratic war.
>
> Q. If God chose that Jehovah's Witnesses should participate in theocratic war, would you do so? A. I don't know exactly, no, because I wouldn't know when there was—
>
> Q. Assuming that He did, God did, command theocratic war? A. I mean I don't understand what you mean there.
>
> Q. I mean if in the event the Jehovah's people were [31] attacked, an evil force attempted to destroy Jehovah's people, would you, as a Jehovah's Witness, take arms to preserve your people and your belief that you do believe in? A. Well, I would have to say no, because it was at the time during the last war, they were all in prison, too, under Hitler, and the people refused to take up arms, so, therefore, they were put into concentration camps.

Q. But during the last war Jehovah's people were not being attacked by Hitler. A. Not necessarily like that, but it is like where all they had to do was sign a piece of paper saying he was the higher power and they refused to do that, because they know there is only one power.

Q. It is your belief you would not participate in any way, in any form, directly, or indirectly, is it not? A. That is correct.

Q. Even to the extent of participating in the war effort in a civilian capacity, working in defense industry? A. That is true because I consider if you are working in a defnse plant, you are making bullets, and so forth, provided for men to use, but I would be willing to do some other kind of work?

Q. Were you aware General Motors is one of the largest wartime contract holders? A. Yes, sir, but when I was working there, we were [32] making cars for personal use for people. They were not making any kind of war material.

Mr. Mitsumori: No further questions." [R. p. 38.]

POINT TWO.

The Advisory Recommendation by the Department of Justice Was Neither Arbitrary nor Capricious and Was Based on Sound, Relevant and Material Grounds.

This point is similar to Appellant's Point One. Therefore, it is respectfully requested that the Appellee's Argument in answer to Point One be made applicable also to Point Two.

The duty to classify registrants, to grant or deny exemptions to conscientious objectors is vested in the draft

boards, local and appellate and not upon the Department of Justice.

50 U. S. C., App., Sec. 460.

The Department of Justice Hearing is advisory in nature; the appeal board is not bound to follow the recommendation of the Department of Justice.

United States v. Nugent, 346 U. S. 1;

Imboden v. United States, 194 F. 2d 508;

Title 50, U. S. C., App., Sec. 456(j);

Title 32, C. F. R. (1951 Rev. Ed.), Sec. 1626.25.

In *United States v. Nugent* (*supra*), the Supreme Court stated the requirements for the Department of Justice inquiry as follows, at page 6:

> "We think that the Department of Justice satisfies its duties under §6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report . . ."

(Continuing on p. 9):

> "Accordingly the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board."

The Government contends that while due process does not require that the standard denoted in the *Nugent* case

be met, the Government has exceeded the standard of the the *Nugent* case here.

United States v. Simmons, supra.

Appellant states in his opening brief, on page 9, that:

> "The sole and only reason for the recommended denial of the conscientious objector claim was that the appellant believed in self-defense and theocratic warfare notwithstanding his opposition to the participation in war between the nations of this world."

A reading of the advisory recommendation of the Department of justice indicates that the appellant is in error, for on page 40 of Government's Exhibit No. 1, the basis for the advisory recommendation is the entire file and record:

> "After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained."

The record includes the appraisal of the good faith, demeanor and sincerity of appellant's conscientious objections. These are not artificial, irrelevant and immaterial elements, but, in fact are the essence of what constitutes a true conscientious objector.

United States v. Simmons, supra.

VI.
CONCLUSIONS.

The questions raised in this appeal fall within the limitations of judicial review of Selective Service Board action as stated in *Cox v. United States,* 332 U. S. 442. The trial court found that there was no arbitrary or capricious action by the Selective Service Boards.

There was no error of law in the rulings of the District Court. Therefore, the conviction should be affirmed.

Respectfully submitted,

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No. 14,335

IN THE

United States Court of Appeals

For the Ninth Circuit

JOANN A. VAN DOLAH, by Anne T. Van Dolah Gordon, Mother and Next Friend,

Appellant,

vs.

SALVATORE MELE, MYRTLE HOLLMAN and CHARLES J. BRADY, Partners, doing business as The Red Cab Company,

Appellees.

Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEES.

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No. 14,335

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Appellees.

Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEES.

I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is an appeal taken from a final judgment rendered on the 27th day of January, 1954, by the District Court for the District of Alaska, Third Division,

in favor of the appellees (defendants in the lower court) and against the appellant.

The District Court for the District of Alaska is a Court of general jurisdiction consisting of four Divisions, of which the Third Division is one. Jurisdiction of the District Court is conferred by title 48 U.S. Code Section 101. See also, Alaska Compiled Laws Annotated, 1949, 53-1-1 and 53-2-1. Practice or procedure of the District Court since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure, which were extended to the Courts of the Territory of Alaska on that date. 63 Stat. 445, 48 USCA 103-A.

Jurisdiction of this Court to review the judgment of the District Court is conferred by new Title 28 USC Sections 1291 and 1294 and is governed by the Federal Rules of Civil Procedure.

II.

STATEMENT OF FACTS.

On the evening of October 5th, 1951, between the hour of 5 and 5:30 o'clock (R 230-172) Leonard W. Roberts, in the employment of the appellees, a co-partnership doing business as the Red Cab Company, having picked up a fare in the persons of Harold Munson and his wife, at or near the Elks Club in the City of Anchorage (R 237), proceeded in a southerly direction along L Street out of the City of Anchorage

toward the adjacent community known as Spenard (R 230) located south of Anchorage, and while proceeding along the extension of L Street, which is known as Spenard Road as it extends south of the City of Anchorage Boundaries, struck or collided with the appellant, Joann Van Dolah, a female child of the age of nine years, as she suddenly appeared from behind a parked car (R 232). The accident happened just shortly after the cab crossed Chester Creek on Spenard Road proceeding up Romig Hill. Although appellant's witness testified lights were optional, the cab was proceeding with lights, either parking or headlights (R 234).

The evidence shows that the accident took place during the twilight hours of the day (R 69) and that the vehicle driven by Leonard W. Roberts was operated at a rate of speed of approximately 15 to 20 miles per hour (R 232). The cab was stopped after the impact within less than the length of the vehicle (R 232-234).

The evidence shows (R 177) that there was heavy traffic going in both directions (R 236) and that there were ten or fifteen cars, including the cab in question, directly behind a bus, and there was still a line of traffic in back of the Red Cab (R 236); that as the string of traffic proceeding up Romig Hill at 15 to 20 miles per hour (R 232) the appellant, Joann Van Dolah, without looking (R 181) ran out from in front of a parked car (R 230) and was hit by the right front fender of the cab. The impact threw her some 15 to 20 feet ahead of the cab (R 230-231).

From the undisputed evidence, the appellant Joann Van Dolah was established to be a cautious girl of nine years (R 142) being frequently trusted to cross the street and shepherd the younger children of a neighbor (R 158). No one of appellant's witnesses, save and except possibly Richard Lobdell, who saw nothing prior to the impact (R 67), actually saw the accident or the collision between Joann Van Dolah and the Red Cab. The girl herself saw no cab and stated that she looked in both directions (R. 144) prior to the accident.

By reason of the injuries sustained by the girl, plaintiff below sought damages. After a dismissal of the suit as to Leonard W. Roberts because of want of service, and on this state of facts, the question was submitted to the jury, which duly returned a verdict in favor of the defendants, appellees herein. Upon the denial of appellant's motion for a new trial, this appeal is taken.

III.

SUMMARY OF ARGUMENT.

The appellees submit that the Court should have granted appellees' motion for a directed verdict made at the close of plaintiff's evidence and renewed at the close of all evidence (Vol. 1 Record, 19). If appellees are correct in this position, then it is urged by the appellees that in fact no instruction, however improper, could be prejudicial to the appellant's case,

which was not entitled to go to the jury in the first place. The appellees will in this brief, without waiving their primary position as above set forth, follow the order of appellant's brief for the sake of convenience.

The appellant has claimed that the District Court erred in the following respects:

(1) That the appellant claims that the District Court has erred in giving certain instructions. It is to be noted that while exception was taken to the Court's instructions 1, 2, 4, 5, 6, 8, 10 and 11, that the appellant in her brief, has treated only with instructions 5, 6 and 10 and has further treated with the failure of the Court to give plaintiff's offered instructions Nos. 6 and 7 and accordingly, only those particular instructions which are noted in the brief of the appellant will be considered for the purpose of this brief. It is to be noted that the Court granted appellant's exception as to instruction No. 1.

The appellant takes exception to the instruction No. 6 given by the Court and in appellant's argument No. 1, appellant recites only a portion of said instruction, which in its entirety reads as follows:

> "Negligence is never presumed. The presumption of law is that persons act with due care for the safety of other persons and their own safety. This applies both to negligence charged by the plaintiff against the defendants and also to the averment of contributory negligence made by the defendants as to the acts of Joann Van Dolah. A mere surmise that there may have been negli-

gence on the part of one or more of the defendants or on the part of Joann Van Dolah, or the mere fact that an accident happened wherein Joann Van Dolah was injured, do not in and of themselves entitle the plaintiff to a verdict against the defendants or any of them nor serve as actual proof that the child Joann Van Dolah was guilty of contributory negligence.

You are instructed that no verdict can rightfully be given against any of the defendants unless a preponderance of the evidence shows that such defendant was negligent and that his negligence, under these instructions, was the proximate cause or one of the essential elements of the proximate cause of the injuries to Joann Van Dolah. Without negligence there is no liability. The burden is upon the plaintiff to prove the negligence of the defendants and the defendants are not required to prove that they were without negligence."

It is contended by the appellees that the instruction above given is not a unilateral instruction, but is in fact a bilateral statement, as favorable to the plaintiff as it is to the defendants. Appellees further contend that appellant recites the instruction piecemeal and out of context.

(2) In appellant's argument No. 2, appellant urges that the Court erred in giving instruction No. 10, a part of which instruction is set forth in appellant's brief. The entire instruction as given by the Court reads as follows:

"A driver of a motor car who is driving in accordance with the governing law and the regula-

tions having the effect of law, is not obligated to anticipate that any person, whether child or adult, will suddenly or unexpectedly dash in the path of his vehicle so that in the exercise of ordinary care, the driver of the car is not able to stop or change the course of his car sufficiently to avoid injury to the pedestrian. In this case, if you find that the defendant Leonard W. Roberts, the driver of the taxicab, was driving said taxi in accordance with the law and the speed and other regulations governing the driving of vehicles on the highway at the place where the accident occurred and that the child suddenly and unexpectedly darted or ran in the path of his vehicle so that it was beyond his power to stop the taxi or to swerve it sufficiently to avoid the child, then the defendants and each of them are not responsible to the plaintiff in this action and your verdict must be for the defendants and against the plaintiff."

To this instruction, the appellant takes exception on the basis that the Court should have instructed that the defendants must anticipate the presence of others, including pedestrians, on the highway (appellant's brief p. 6). The appellant argues that a motorist must expect others upon the highway, which is true, but a motorist may also expect that these other persons will use reasonable care under the circumstances, and therefore appellees contend that the instruction was properly given. The appellant fails to consider and meet in her argument and to interpret the instruction in its entirety for what it means, in that appellant fails to recognize the difference between a motorist

using the highway in a heedless manner and a motorist using the highway in a reasonable and prudent manner, or in the exercise of ordinary care. The appellant's argument further fails to recognize that any person using the highway, be he pedestrian or motorist, is required to use reasonable care for his own safety and the safety of others. The Court's instruction does not excuse a motorist who carelessly uses the highway but does excuse from liability a motorist using and exercising ordinary care, where a pedestrian suddenly darts upon the highway into the path of a vehicle so that it is beyond the power of a driver to stop the taxi or swerve it sufficiently to avoid the pedestrian.

(3) Appellant contends that appellant's offered instructions Nos. 6 and 7 were refused erroneously by the Court, which instructions are set forth in full at page 9 of appellant's brief. The appellant's offered instructions Nos. 6 and 7, without going into the merits or verbiage of the instructions themselves, deal generally with the application of the last clear chance doctrine, which doctrine, in order to be applicable, presupposes contributory negligence on the part of the appellant. The application of the doctrine itself appellees contend is not initiated until and unless it has been established by some substantial evidence that the appellees discovered, or by the exercise of reasonable care should have discovered, the perilous position of the appellant. There is some support for the proposition that the doctrine may be applied if the appellees have not discovered the perilous position of the ap-

pellant if by reasonable or ordinary care appellees should have discovered the peril of the appellant, which latter position is not supported, as appellees believe, by the great weight of authority. Appellees' position is that there was no way for the appellees to discover the peril of the appellant since it was a split-second position of peril at the time the child ran, trotted or ambled at a right angle into the path of the appellees' cab from behind a parked car. There is no error for refusing to give instructions not warranted by the facts.

(4) The appellant further urges that the Court erred in giving instruction No. 5, a part of which instruction is set forth on page 11 in appellant's brief. While the appellant took exception to instruction No. 5 as modified at the request of appellees (R 315) no grounds for taking exception were recited by the appellant in the record. The whole of said instruction as given by the Court reads as follows:

> "You are instructed that some stress has been laid by the plaintiff upon uniform usage, custom or practice on the part of the plaintiff and the children in that vicinity to use the place where the plaintiff testified she crossed the highway as a means of crossing said highway. The defendants deny the existence of such a custom. You are instructed that by the term 'general custom' is meant the general way of doing some particular thing—the usual way of doing such thing. To establish a general custom in reference to any particular thing or way or manner of doing such thing, it must be made to appear from the evi-

dence that such custom was generally and uniformly extended to all persons under like circumstances and conditions, and that the same is notorious; that is, well understood. So if, in the case at bar, it does not appear from the evidence that the children in that neighborhood crossing the Spenard highway at this pint use that particular section of the road as a means of crossing, then the general custom in question in this case is not established.

You are instructed that custom or usage governing a question of legal right cannot be proved by isolated instances, but should be so certain, uniform and notorious that it must probably be understood by the plaintiff at the time she crossed the highway, and by the defendant, Leonard W. Roberts, as he was travelling down the highway at that point. The burden is upon the plaintiff to prove that such a custom existed by a preponderance of testimony; and that the defendants knew or should have known that such custom existed, if you should find that she has failed to establish such a custom by the preponderance of testimony, then, upon that branch of the case, you should not consider it further as having any bearing upon the case, in making up your verdict."

While the appellant states that it was the uncontradicted evidence that the children and grownups in that vicinity crossed the Spenard Road at a point near the foot of Romig Hill, appellant's position is undocumented by any reference to the record. Appellant's only reference to the record in regard to

evidence in chief is contained in the statement of facts in appellant's brief, page 2, which references, read in their entirety, only disclose that an accident happened and that the appellant was injured. Appellees submit that there isn't, even viewing the entire evidence on this point in the most favorable light to the appellant, sufficient evidence to establish a custom or usage unless appellant contends that questions of counsel in this regard are in fact evidence. Such a position is unthinkable. While it is harmless so far as the appellees are concerned, the instruction of custom and usage was, as appellees believe, not warranted by the evidence.

(5) Appellees contend that the Court specifically advised appellant (R 304), (Vol. 1 Record, page 74) that time was available for any proper rebuttal testimony. The record discloses that the appellant not only had an opportunity to put on rebuttal but did in fact call all of her chief witnesses except Dr. Ivy and Richard Lobdell back and took their rebuttal testimony. That the appellant's complaint that she was not allowed time for proper rebuttal testimony is an admission of lack of evidence sufficient to take the case to the jury. The Court did not limit appellant on rebuttal testimony but did in fact properly restrict the nature of the rebuttal to controverting the material testimony of the defense in chief.

While no particular point is made by appellant in respect to prejudicial treatment of appellant's counsel, there is some authority recited in appellant's argument number five, dealing with the law in that respect.

Appellees submit that there is no substantial similarity between the facts in the case at bar and the facts recited in *Collins v. State,* or *Shepard v. Brewer.* It is true that during the appellant's rebuttal, some differences of opinion were expressed in respect to testimony in chief and an expression of the Court that certain statements should not be made before the jury. The only possible reflection that such discussions could have, as appellees believe, is that the jury may have had grave doubts about the powers of mental retention on the part of the Court and both counsel so far as the prior testimony was concerned.

(6) It is the position of the appellees that the question of whether or not a jury should be allowed to view the scene of the accident is within the sound discretion of the Court and that the Court properly exercised its discretion without prejudice to the appellant.

IV.

ARGUMENT.

Upon the trial, appellant in taking exception to the Court's instruction No. 6 stated as follows (R 313):

> "Mr. Bell. I seriously take exception to No. 6, in the last paragraph because it still confines her to only recover if the defendants themselves are negligent, not the agents, servants or employees. That is this instruction No. 6."

Appellant's brief apparently abandons the position for the original exception and seeks other grounds.

Appellant now urges that no valid purpose can be served by raising an assumption of due care in this case. As has been previously pointed out in the summary of argument, supra, the appellees are of the firm conviction that appellant's argument No. 1 is academic in this case as there was, as appellees contend, insufficient evidence to warrant submitting this question to the jury and accordingly, if appellees' position in that regard is well taken, the instruction No. 6 complained of, if incorrect, which is not admitted, would in no wise prejudice the rights of the appellant for the reason that appellant was not entitled to have it go to the jury in the first place.

While appellees feel the argument in connection with the first point raised by appellant is moot, it should be pointed out that the exact instruction, or even a similar instruction, was nowhere treated in any of the case law cited by the appellant. The appellant's cases are based upon a singular instruction, or as we choose to call it, a unilateral instruction, whereas the instruction of the Court here given as instruction No. 6 was a bilateral instruction. In other words it was as fair to the appellant as it was to the appellees in that the instruction applies to both the "negligence charged by the plaintiff against the defendant and also the averment of contributory negligence made by the defendants as to the acts of Joann Van Dolah."

Appellant argues that the instruction given, improperly places the burden of proof, but as will be seen in instruction No. 2 (R Vol. 1 page 32) an in-

struction was given by the Court in respect to the burden of proof, which instruction appellees contend is correct and although exception was taken thereto by appellant, no argument or authority was urged or set forth concerning such instruction in appellant's brief, and accordingly the Court should properly disregard exceptions taken to instruction No. 2 and therefore assume that the instruction was properly given. See *Nelson v. Johnson,* et al., 243 Pac. 646, decided in 1926, in the Idaho Supreme Court, appeal and error, key No. 1078(1).

If appellees correctly understand the academic side of the objection placed by appellant as to instruction No. 6, it could be stated thusly: there is substantial authority in some jurisdictions for the proposition that as against a proved or admitted fact a disputable presumption has no weight.

The most extensive discussion of the rule involving presumption found by the appellees is in *Mar Shee v. Maryland Assur. Corp.,* 190 Cal. 1, 210 Pac. 269. It appears that there are three conflicting positions in respect to presumption. The first one admonishes the trial judge to instruct the jury on all proper occasions

> "that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a * * * presumption".

Secondly, there is the line of cases illustrated by the *Savings & Loan Socy. v. Burnett* case, 106 Cal. 514, 39 Pac. 922, where the rule is stated as follows:

> "Disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled."

The third rule recognizes that:

> "As against a proved fact, or a fact admitted, a disputable presumption has no weight",

and further that

> "Where * * * an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence including the presumption."

The California Court in the *Mar Shee* case then went on with a determination of what a "proved fact" is within the meaning of the rule and in the *Mar Shee* case upon the established or admitted facts that Fong Wing was shot twice in the back by some person unknown was led to the inescapable conclusion that the person who did the shooting intended either to shoot Fong Wing or some other person for whom he mistook Wing, but in either event the killing constituted murder in the first degree and accordingly the facts being proven wholly irreconcilable with the presumption of innocence is dispelled and no evidence remains to support the finding that the insured was not murdered.

Regardless of which of the three rules, all of which apparently became reconciled in the State of California under the ruling of the *Mar Shee* case, is followed, there is a wide breach in the positions of various Courts that range all the way from a holding such as first cited above to the position of that as recited by the appellant in the Minnesota case of *Tepeol v. Larson,* 53 NW (2d) 473. The other extreme is recited in the case of *Clark v. DeMars, et al.,* Supreme Court of Vermont, 1929, 146 Atl. page 812, which, so far as the appellees have been able to ascertain, is still the law of Vermont, where the Court held that it was the established doctrine of that Court that when, in the trial of a civil case, a person is charged with a crime, there is a legal presumption that he is innocent which is evidence in his favor and is to be considered by the jury in connection with the other evidence in the case, and the defendant was entitled to an instruction to that effect. The evidence having called for it, the failure to give it was prejudicial error.

As previously pointed out, the appellees have not been able to discover any cases, either cited by the appellant or discovered by the appellees, which treat with a bilateral instruction of due care giving treatment in the instruction as favorable to the plaintiff as to the defendant, and since, as appellees believe, the instruction was as favorable to the appellant as to the appellees and that the case should never have gone to the jury in the first place, and further that the instruction of due care was not given in the face of a

proven or agreed set of facts but on the contrary there was no substantiated evidence of negligence on the part of the appellees any possible error in instructing was harmless. While the appellant's argument throughout her brief is singularly lacking in documentation except as to argument Nos. 5 and 6, it is obvious that the appellant is urging a moot question deserving of no further treatment on the part of the appellees. The attention of the Court is called to the record, page 232, which clearly indicates that the cab driver was operating his vehicle in a reasonable and prudent manner and was operating it at a speed of between 15 and 20 miles per hour in a continuous string of traffic proceeding in a southerly direction up Romig Hill at the busy hour of the day, and although some automobiles were being operated at this time near sunset without lights, that the cab was in fact being operated with lights, indicating that the cab driver was careful and prudent in his method and means of operation, and the witnesses nowhere dispute this fact. The only witnesses indicating to the contrary are witnesses of the appellant who never saw the accident but attempted to testify as to what was usual and ordinary in respect to the flow of traffic at the particular point of the accident. In view of the fact that Mr. Lobdell was the only witness for appellant who saw any part of the accident, it must be assumed that the jury disregarded his testimony, in view of the question as to his recollection, in that he testified that Joann Van Dolah was removed from the scene of the accident in the fire rescue truck (R 67-

69) while all other witnesses agree that the girl was taken from the scene of the accident in a car belonging to a friend of Mr. McWhorter which was backed up the hill to the scene of the accident (R 35-38) from the easterly side thereof. Viewing the evidence in its most favorable light, appellant did not overcome the presumption which was properly presented to the jury in the bilateral instruction. Certainly where, as in this case, the appellant fails to state in her exception the grounds urged in her brief, the Court would have no proper way of ruling upon the exception and accordingly the argument of appellant in respect to this instruction should not be considered by this Court.

Appellant's argument No. 2 is based upon alleged error in the giving of instruction No. 10, which is fully set forth in the summary of appellees' argument. The effect of appellant's argument is that a driver of a motor vehicle is bound at his peril to anticipate the presence of others including pedestrians on the highway and although not so stated in as many words, we would assume that the appellant urges that such presence must be anticipated under any circumstances. We must urge that the law is to the contrary and this is particularly true in regard to sudden appearance. It must be remembered that Joann Van Dolah appeared suddenly from the right hand side of the road, from behind a parked car, in respect to the direction in which the cab driver was going. The authority is in abundance on the general principle that motor operators must keep their machinery under control so as to avoid collision with others

using the highway with ordinary care and prudence. The Courts have, in nearly all jurisdictions, determined that a sudden appearance of a child or adult clearly excuses the motorist using due care. This position is justified on one of two theories, either that it was an unavoidable accident or that the sudden appearance of the pedestrian or other obstacle violated the use of the highway with ordinary care and prudence. Attention of the Court is called to the case of *Hall's Adm'x. v. City of Greensburg, et al.,* 241 Ky. 279, 43 SW (2d) 660, Court of Appeals of Kentucky, decided in 1931, in which exception was taken to the instruction:

> "If you believe from the evidence that the decedent, Charles Hall, came suddenly from behind the sand bin in evidence and in front of the defendant's car, and so close in front of it that said Mrs. Wilson could not by the exercise of ordinary care and the use of the means at her command, either stop her car or change its course to give said Charles Hall warning of her presence by the usual sign in time to have avoided the collision, then the law is for the defendants, Wilsons, and you should so find."

The effect of the instruction No. 10 complained of by the appellant is almost identical in intent and meaning to the instruction given in the Kentucky case hereinabove mentioned. See also *Haydon, et al. v. Bay City Fuel Co., et al.,* Supreme Court of Washington, 1932, cited at 9 Pac. (2d) 98, where a boy almost 5 years old had been standing behind a mail

box which concealed him. He darted straight across the street, and was struck by a truck going not over 25 miles per hour. The place where the truck started to skid and where it stopped showed that the accident did not occur at a street intersection. There was no proof that the truck driver did not keep a proper lookout, or that sounding the horn would have averted the accident. As soon as he saw the boy the driver did everything possible to avoid the accident.

So likewise in the case at bar the greater weight of the evidence shows that the cab driver was proceeding at a reasonable rate of speed between 15 and 20 miles per hour, that he stopped within the length of his car. The testimony of Harold Munson, a passenger of the cab, is that the right rear door of the cab was just abreast of the front end of the parked car (R 232) from whence the girl made her appearance and proceeded without warning across the busy thoroughfare. While it is contended by the appellant that the accident took place at or near a usual crossing, there is no satisfactory evidence in the record to disclose that such was the case.

See also *Kessler v. Robbins,* 215 Iowa 327, 245 SW 284, Supreme Court of Iowa, decided in 1932, under an almost identical state of facts or perhaps a statement of facts even more favorable to the plaintiff than is here presented, the upper Court sustained a directed verdict for the defendant. We say the facts are more favorable in the Iowa case. The girl from 10 to 11 started suddenly across the street in front

of the defendant and within 5 feet of the defendant's moving automobile. The defendant slowed to a speed of about 15 miles per hour as he approached the place of the accident, which was near some mail boxes, being the point where the two children alighted from a school bus and were awaiting the passing traffic before going to their respective homes across the main travelled highway. See also *Maffioli v. George L. Griffith & Son, Inc.,* Supreme Judicial Court of Massachusetts, February 28, 1935, 194 NE page 726, which was a sudden appearance case involving a scooter used by a boy 8 years and 10 months and the facts of the appearance were very similar to those presented in the case at bar. The Court held that upon the entire record it could not properly be found that the accident was due to the negligence of the defendant and it is unnecessary to decide whether the plaintiff was in the exercise of due care. The trial Court in that case was held to have correctly directed a verdict for the defendant.

Appellant takes the position that the cases do not distinguish between persons who are walking across the road, who dash across the road or who crawl across the road. With this we must disagree. In the *White v. State of Maryland* case, 106 Fed. (2d) 392, cited by appellant, there was no evidence that the pedestrians using the highway made a sudden appearance and in fact the Court indicated that the jury must have found that the decedents were on the road for some distance and that the driver of the vehicle who was acquainted with the scene of the accident, either saw or should

have seen the decedents upon the highway and his failure so to do convinced the jury that the driver then was negligent. Without exception the other cases cited by the appellant in argument No. 2 indicate that a driver is bound to anticipate the presence of *others using the highway with ordinary care and prudence* as is pointed out in the *Butcher v. Thornhill* case, cited at 58 Pac. (2d) 179. The cases cited, and indeed the undisputed weight of the authority, is that the motorist must use due care and the pedestrian must likewise use due care. It is in failing to interpret the entire text and in reading out of context the instruction of the Court that the appellant finds her fault and accordingly there is no error in said instruction.

In appellant's argument No. 3 it is urged that the last clear chance instruction, as proposed in appellant's instructions Nos. 6 and 7, should have been given and in that respect the appellant recites *St. Louis and San Francisco Ry. Co. v. Starkweather,* 297 Pac. 815, and *Highway Const. Co. v. Shue,* 49 Pac. (2d) 203, which support the proposition that the plaintiff's case could properly be made out upon circumstantial evidence. The *St. Louis and San Francisco Ry. Co. v. Starkweather* case was a workmen's compensation case which smacked more of *res ipsa loquitur* than last clear chance, as indeed did the *Shue* case cited in appellant's brief. Under a proper set of facts the *Starkweather* case and the *Shue* case might be proper authority in Alaska for the propositions for which they stand. However they have no

application to the case at hand. In no place in appellant's brief does she set forth the circumstantial evidence which would warrant the giving of the requested instructions by the Court. We are therefore forced to the conclusion that the circumstantial evidence referred to by the appellant are the circumstances that an accident did in fact take place and that injuries resulted therefrom; and from these facts apparently appellant urges that they give rise automatically to an instruction on the last clear chance, but nowhere in appellant's brief is the evidence documented supporting this conclusion.

To support the proposition that the mere happening or occurrence of an injury does not in and of itself entitle the claimant to a verdict, attention of the Court is called to *Fair v. Floyd, et al.,* CCA 3rd, February, 1935, 75 Fed. (2d) 920. The Court there, while holding that the failure to give a requested instruction as follows:

> "The mere fact that an accident happened and that the plaintiff received some injury is not sufficient to permit the plaintiff to recover"

was not error. The Court clearly recognized that the theory of the offered instruction was correct and was in fact law, but stated that the requested instruction was merely a negative way of stating what the Court had already said affirmatively.

The Court's attention is also called to *Gordon v. General Launderers, Inc.,* March, 1941, Supreme Court of New Jersey, 18 Atl. (2d) 719. The Court there

labelled as not error the following requested instruction:

> "Negligence is never presumed but rather there is a presumption in favor of the defendant that he was not negligent."

The Court stated, and we quote:

> "As to this we think it was fully covered by the instruction of the court that the mere fact of injury did not entitle the plaintiff to a verdict, but that his action was based upon negligence and that it was necessary to establish that he was injured, and also that his injuries were due to the negligence of the defendant corporation * * *."

By analogous reasoning, if the mere happening of an accident and the injury of appellant does not entitle her to a verdict, neither should such circumstances entitled her to an instruction, not warranted by the facts, which might entitle her to a verdict by way of circuitous reasoning. Generally the law does not allow one to do indirectly that which is prohibited to be done directly.

While we might assume for the purpose of argument that the authority recited by appellant in her argument No. 3 may be good law in a cause which would warrant its application, we certainly cannot agree that the facts herein warrant such an application, and it goes without dispute that the appellant failed to recite any facts which would entitle her to the application of the law recited.

The law is, as appellees believe, undisputed that a trial Court correctly refuses to give a requested instruction where the instruction is not supported by the evidence, and certainly such a refusal is not error. See *Rudolph v. Wannamaker, et ux.,* 1925, Idaho Supreme Court, 238 Pac. 296; *Merchants & Bakers Guaranty Co. v. Washington,* 94 Pac. (2d) 930, 185 Okla. 532, 137 ALR 1123; *Gossett v. Van Egmond,* 155 Pac. (2d) 304, 176 Ore. 134.

The authority on this point is so ample that the only question is the difficulty of which source to cite. Appellees further call the attention of the Court to the rule that an instruction not based on any evidence is improper and should not be given to the jury. *Porter v. Terminal R. Ass'n. of St. Louis,* 65 NE (2d) 31, 327 Ill. App. 645. Accordingly the obvious conclusion is directly the converse of the position of the appellant and if in fact the instruction requested in appellant's argument No. 3 had been given, as set forth in plaintiff's offered instructions Nos. 6 and 7, the same would have been prejudicial error so far as the appellees are concerned.

Appellant's argument No. 4 is based on the proposition that the Court erroneously gave instruction No. 5 and urges that it is the uncontradicted evidence that the children and grownups in the vicinity cross the Spenard Road at a point near the foot of Romig Hill. Again we are unable to pinpoint the appellant's argument in respect to the facts, as no documentation from the record is given. There was an attempt on the part of the appellant on rebuttal examination of

the girl, to obtain testimony that she always crossed the road at a certain point (R 298). The offer of evidence was properly denied for the reason that it had no bearing upon where the girl crossed the road at the time of the accident, and further the mere fact that a sole individual may by habit or instinct cross a highway at a given point for any length of time, on its face fails to show that it is the long established custom of the community to cross a road at a particular point, or that the habit or custom of the community is controlled by the individual who, through habit or inclination, makes that given point a crossing, and by no stretch of facts or argument could it be urged that motorists should under such circumstances be acquainted with the individual habits of a particular person.

Appellant further urges, under argument No. 5, that the Court erred in excluding competent evidence offered in rebuttal by the appellant and in this regard appellees call the attention of the Court that in a discussion between the Court and counsel in the lower Court, that counsel for the appellant presumed that 15 minutes would be sufficient for his rebuttal testimony (R. 285). This part of the transcript was merely an attempt to determine between Court and counsel the matter of time, which is usual and customary particularly in the District Court for the District of Alaska, Third Division, where the Court's calendar is crowded and the Court frequently attempts to determine in advance the amount of time required for any particular presentation, in order that the way

may be made clear for other litigation pending. Reading the transcript in its most favorable light to the appellant, there was nothing prejudicial in the action of the Court, and the Court specifically stated at one point in the discussion as follows:

> "The court only has objected to what you state by virtue of the fact that it is surplusage. Now, if you have any rebuttal testimony that you desire to put on at this time, you may do so. But the court must limit you to rebuttal testimony and a lot of new material is not relevant." (R 304)

If the language of the Court above quoted did not clearly indicate to appellant's counsel that he was at liberty to proceed, then appellees are at a loss to understand the intent of the Court, as the words therein expressed, taken in their ordinary, usual meaning, could convey no other thought. The language is unmistakably clear that the appellant was at liberty to proceed with any proper testimony that might rebut the case in chief of the defendants.

On page 21 of appellant's brief, the situation presented is whether or not Mrs. Van Dolah Gordon was crying at the scene of the accident. This series of questions arose apparently out of the testimony of Mr. Read (R 181) at which point Read indicated that a woman whom he thought to be the mother of the girl in question was crying, and accordingly appellant sought to impeach the testimony of Mr. Read in respect to this collateral evidence. It is difficult to understand the position of the appellant as to what possible good or effect could be accomplished by show-

ing that Mrs. Van Dolah Gordon did not cry at the scene of the accident and that the woman who was with her did not cry, so far as he knew. Mr. Read only testified that a woman whom he took to be the girl's mother was crying. In any event the testimony was already before the jury and although the objection was sustained, the Court did not instruct the jury to disregard the testimony already given as indicated on page 20 of appellant's brief by underscore.

Now, let us review the transcript which appellant recites in part in her brief, pages 13 and 14. This portion of the transcript is found at R 284-287. The transcript here in all respects shows a perfectly normal exchange between Court and counsel, with the possible exception that in response to the Court's first question (R 284) at the bottom of the page, appellant's counsel misunderstood the Court. It is evident that the Court inquired as to how much time would be required for rebuttal and speculated on 10 minutes. Mr. Bell apparently understood the Court to indicate that the appellant would have 10 minutes to argue the case to the jury.

Appellees fail to see where this exchange of conversation is any more prejudicial than the Court's statements to appellees' counsel found at 272-274 of the record, where counsel for appellees over-urged a point already ruled upon by the Court, and the Court properly cut appellees' counsel short.

Appellant quotes a substantial portion of the record —292-296. The only portion alleged to be objection-

able according to appellant's underscores, appears at R 296, where the Court advised Mr. Bell in substance that he should not state before the jury that the drawings made by previous witnesses were out of proportion and that the drawings made by other previous witnesses might confuse Joann Van Dolah. The court no doubt felt that Mr. Bell was either arguing the prior testimony of the witnesses to the jury at an improper time or that Mr. Bell was in effect giving testimony or opinion on the prior drawings or sketches illustrative of the testimony of witnesses. In either event the Court quite properly instructed the jury to disregard the statement of counsel.

At pages 298 and 299 of the record, the Court refused to allow a drawing made by the appellant during noon recess to go into evidence as rebuttal. The Court at this same point sustained an objection to a question by appellant's counsel (R 298):

> "Did you cross farther down going over or do you * * * I will withdraw it. Do you always cross at a certain place?"

Mr. Bell then indicated that the witness had answered the question and the Court instructed the jury to disregard the answer.

In respect to the latter situation, to which appellant took exception, there was no proper foundation laid for such a question and appellant's counsel was obviously laboring with attempted proof that Joann Van Dolah, without exception in her life, crossed the road in question at a particular point. Aside from

being somewhat hard to believe, if true, the testimony had no place in rebuttal. It is interesting to note the prior testimony of the same witness at R 295.

At this point the same witness was asked:

> "Now, is there any path or trail that you follow through there or was there at that time a trail, a regular trail, that you followed through?"

The answer of Joann Van Dolah was:

> "Not especially but most of the children just went that way." (R 295).

It is quite obvious that the girl had answered the question as best she could, but there is a point at which the human mind will not resist the power of suggestion and accordingly rules of evidence were developed to guard against suggestion in the form of leading questions. It is to be noted that the above quoted question and answer did not involve a pedestrian road crossing but a path leading to a small house or dwelling on the Werenburg property.

At page 18 of appellant's brief, there is recited with emphasis a quotation of a statement of the Court found at Record 301:

> "That is not true."

Appellant is claimed to have been prejudiced by such remark on the part of the Court. As the appellees now read the record, no determination can be made as to whether the Court was taking issue with counsel for appellant or counsel for appellees. It is

plain that the Court favored the position of Mr. Bell on the question of whether or not Mr. Read testified that he was in the last driveway. This matter is resolved in Mr. Bell's favor (R 302):

> "The Court. Well, the court's recollection is, and the court could be wrong, on the position of Mr. Read was that it was in the last driveway."

Since the Court obviously agreed with Mr. Bell it follows that the emphasized quotation at R 301:

> "That is not true"

was intended as an impeachment of Mr. Hughes' recollection of the testimony. While it is a matter of small moment, appellees submit that at no place in the record does Mr. Read state he was in the last driveway (R 196, 204, 214). The appellees further submit that Mr. Read's testimony at R 197 clearly indicates a driveway above the one in which he parked. Certainly if the cab pulled off the road twenty-five feet above Mr. Read on the hill there was either a driveway or a parkway. It would therefore appear that while the Court agreed with Mr. Bell and disagreed with Mr. Hughes, both the Court and Mr. Bell were in error, and if Mr. Bell or the appellant were harmed by a statement directed against Mr. Hughes, the blame should not be laid at the door of the appellees by reason of Mr. Hughes having properly stated the testimony of appellees' witness.

Any doubt that the jury may have had in respect to the exchange above mentioned should have been dispelled by the Court (R 302):

> "Let the record show that the court ruled upon the objection as being that the question was not proper rebuttal and not as to the statement."

At page 25 of appellant's brief there is quoted certain portions of the record found at R 303, 304 and 305. The interrogation attempted by appellant is obviously examination in chief which the Court properly refused and there resulted an instruction of the Court to Mr. Bell that he should not make statements of a certain nature before the jury. The statement referred to by the Court was of course one upon which the tongue of a clever trial lawyer could hang the rich drippings of pathos (R 303):

> "This is the most important thing on earth to this little girl."

Mr. Bell took exception and referred to his 39 years of practice; the Court responded and Mr. Bell had the last word. By any fair standard, it appears that this exchange could be declared a draw without damage to either side.

The law recited in appellant's argument number 5 is embraced largely in the cases of *Collins v. State,* 54 So. 665, and *Shepard v. Brewer,* 154 SW 116.

The appellees submit that there is no reasonable comparison between the state of the record as recited by appellant and the authority cited by appellant in respect thereto. Appellant cites *Collins v. State,* supra, which was a criminal case in which the trial Court, on motion of defense counsel to delay a criminal trial by reason of the absence of a material witness, placed

the defendant on the stand in the presence of the jury and put to the defendant certain questions in respect to her knowledge of relations with one Bill Hinton. The judge in substance asked such questions as:

> "Hinton is a white man, isn't he and you are a nigger, aren't you?"

And by inference and innuendo in his questions intimated that there was a rather intimate relationship between the defendant and the absent witness. The cited case has no application since it deals with a defendant in a criminal case and not with counsel and while we take no particular exception to the rule as laid down in *Collins v. State,* it has little to offer by way of assistance to either party herein.

In *Shepard v. Brewer,* supra, the Court in trying out a defamation suit, threatened or intimated that the plaintiff's counsel was guilty of contempt or might be subjected to punishment for contempt. No such an inference can be drawn from the record herein and it is submitted that there is considerable difference between threatening counsel for contempt and merely disagreeing with counsel or telling counsel that he is wrong. If in fact the trial Court were held to such a standard of decorum that it could not with propriety control the proceedings of the trial and could not rule upon the evidence to be introduced at the time of trial without argument, then indeed the province of the trial Court has been seriously invaded. It is submitted by the appellees that the trial Court properly ruled on the evidence in question although, as is indi-

cated by the record, in a quick exchange of comments, there is some difficulty in determining why an argument took place to begin with. It appears to the appellees from a review of the record that the appellant's counsel was in a large measure responsible for any exchange of language between Court and counsel. It would appear further that appellant's counsel takes the position that the Court is not at liberty to take issue with either of counsel even if said counsel is in error, and that it is prejudicial for the Court to say that counsel was wrong or that the statements made by counsel were not true. Neither the cases cited nor the weight of authority support appellant in this.

The appellees contend that the Court exercised its sound discretion properly in refusing to allow the jury to go to the scene of the accident.

It is submitted that the accident took place on the 5th day of October, 1951, at a time when there was no snow on the ground. The trial was had in December of 1953, more than two years later, at a time when the snow plows had stacked the natural accumulation of snow high on the shoulders of the road. While this fact is not in evidence except as to the lapse of time, it is a position of fact that cannot be denied by the appellant.

Due to the lapse of time and the condition of the terrain, it is most doubtful whether any good could have been accomplished by taking the jury to the scene of the accident. The jury had before it large gloss

prints of the scene of the accident taken by a commercial photographer at or near the time of the accident. There had been ample coverage of the facts by witnesses on both sides. Under the circumstances the case does not fall within the rule of *Nash v. Searcy,* 75 SW (2d) 1052 cited by appellant. It is further worthy of note that appellant made no timely motion to the Court, even as late as the last noon recess prior to which time the Court had advised counsel that it expected to have the case to the jury by 3:00 P.M., no word was heard from appellant except that she desired about 15 minutes in rebuttal and could hold herself to 45 minutes on argument.

CONCLUSION.

There is no error. The case should never have gone to the jury. The appellees respectfully submit that the verdict and judgment of the lower Court should be affirmed.

Dated, Anchorage, Alaska,
October 29, 1954.

DAVIS, RENFREW & HUGHES,
By JOHN C. HUGHES,
Attorneys for Appellees.

No. 14389

United States Court of Appeals

for the Ninth Circuit

TRIPLE "A" MACHINE SHOP, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 12-31-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, for the Northern District of California

No. 26198 In Admiralty

TRIPLE "A" MACHINE SHOP, INC., a Corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Libelee.

LIBEL

Now comes Triple "A" Machine Shop, Inc., libelant above named and, complaining against libelee above named, respectfully alleges as follows:

I.

That at all times herein mentioned, libelant has been and now is a corporation, organized and existing under the laws of the State of California and having its principal place of business in the City and County of San Francisco.

II.

That at all times herein mentioned, libelee, United States of America, was the owner or apparent owner of five (5) certain lifeboats.

III.

That at all times herein mentioned, Military Sea Transportation Service, Pacific, was an agency of

the Department of the Navy of the United States of America; that at all of said times said libelee acted by and through said Military Sea Transportation Service, Pacific, in the ownership, maintenance and repair of said lifeboats.

IV.

That on or about the 2nd day of October, 1950, said libelee, by and through said Military Sea Transportation Service, Pacific, employed libelant to make certain repairs on said lifeboats for which said libelee agreed in writing to pay the sum of Three Thousand Seven Hundred Seventy-five ($3,775.00) Dollars; that a copy of said writing is attached hereto, made a part hereof and marked "Exhibit A."

V.

That libelant completed the said work referred to in Exhibit "A" on or about the 25th day of November, 1950, in strict accordance with the terms and provisions thereof; that said agreed price of $3,775.00 became due on said 25th day of November, 1950; that although often demanded, this libelee has wholly failed and refused to pay said sum, or any part thereof, and that the whole of said sum together with interest thereon is now due, owing, and unpaid.

Wherefore, libelant prays judgment as hereinafter set forth.

As a Further and Second Claim Against Said Libelee, Libelant Alleges:

I.

Realleges all of Paragraphs I to IV, inclusive, of the first cause of libel hereinabove set forth and incorporates the same herein.

II.

That on or about the 15th day of October, 1950, libelee employed libelant to do certain extra work on the repair of said lifeboats, which said work was in addition to the work covered by said Exhibit "A." That said libelee agreed to pay therefor a sum equal to the reasonable value of the labor and materials used in said extra work. That said extra work was completed on or about the 15th day of November, 1950. That thereafter, to wit, on or about the 27th day of November, 1950, libelee gave libelant a statement in writing fixing the reasonable value of said extra work at Nine Thousand Four Hundred Ninety ($9,490.00) Dollars and agreeing to pay libelant said sum. That a copy of said writing is annexed hereto, made a part hereof, marked "Exhibit B."

III.

That although often demanded by libelant, libelee has wholly failed and refused to pay said sum, or any part thereof, and that the whole of said sum, together with interest thereon, is now due, owing, and unpaid.

Wherefore, libelant prays judgment as hereinafter set forth.

As a Further and Third Claim Against Said Libelee, Libelant Alleges:

I.

Realleges all of Paragraphs I to IV, inclusive, of the first cause of libel hereinabove set forth and incorporates the same herein.

II.

That during the months of October and November, 1950, libelee directed and required libelant to furnish labor and materials necessary to effect certain additional repairs on said lifeboats, which said extra work was in addition to and was not covered by said Exhibit "A" or Exhibit "B" herein.

III.

That said last mentioned extra work was completed on or about the 25th day of November, 1950, and was and now is of the reasonable value of Six Thousand Three Hundred Forty-two ($6,342.00) Dollars. That although often demanded by libelant, libelee has failed and refused to pay said sum, or any part thereof, and the whole of said sum, together with interest thereon, is now due, owing and unpaid.

Wherefore, libelant prays judgment against libelee in the sum of Ninteen Thousand Six Hundred Seven ($19,607.00) Dollars, together with interest thereon, court costs, and such other relief as may be proper.

/s/ J. THADDEUS CLINE,
Attorney for Libelant.

EXHIBIT A

Military Sea Transportation Service, Pacific
33 Berry Street
San Francisco 7, California

To: Triple "A" Machine Shop, Inc.,
Pier 64,
San Francisco 7, California.

Date: 2 October, 1950.

Job Order No. 10.

Contract No. MST 235,

Repair to Lifeboats.

This Job Order issued pursuant to the provisions of the above-numbered contract, the terms of which by this reference are made a part hereof, Witnesseth That:

1. Work: The Contractor shall furnish the supplies and services required to perform the work described in the attached plans and specifications made a part hereof and designated as follows: Repairs to Five (5) Lifeboats, Specification No. MSTSP 51-64.

2. Price: The Government will pay the Contractor for the performance of this Job Order the following listed sum plus an amount at the unit prices on the reverse side hereof for the units

specified and furnished under Article 3 (c) of the above-numbered contract: $3,775.00.

3. Commencement and Completion dates: The work will be performed at Contractor's plant.

Contractor shall commence work on: 2 October, 1950.

Work shall be completed on or before: 11:00 a.m., 27 October, 1950.

4. Liquidated Damages: Pursuant to the Article of the said contract entitled "default," the damages payable for each calendar day of delay shall be $100.00.

5. Appropriation Chargeable: The Work is chargeable to the following appropriation, title and account:

1711990.01 24302
079 52900 62383

Payment to the Contractor will be made by the Government through the Navy Regional Accounts Office at Oakland, California.

6. This Job Order is issued pursuant to the authority of the Armed Services Procurement Act of 1947, Section 3.

THE UNITED STATES OF AMERICA,

By /s/ J. K. McCUE,
Captain, USN Contracting Officer.

Accepted:

Date October 11, 1950.

TRIPLE "A" MACHINE
SHOP, INC.,
(Contractor).

By A. ENGEL,
President.

Dp

EXHIBIT B

Military Sea Transportation Service, Pacific
33 Berry Street
San Francisco 7, California

To: Triple "A" Machine Shop, Inc.,
Pier 64
San Francisco 7, California.

Date: 27 November, 1950.

Change Order "A" to Job Order No. 10.

Contract No. MST 235,

Repair to Lifeboats.

This Change Order issued pursuant to the provisions of the above-numbered job order and contract, Witnesseth That:

1. Work: The Contractor shall make changes in the job order in accordance with the work described in the attached specifications made a part

hereof and designated as follows: Addition No. 1 to Specification No. MSTSP 51-64.

2. Price: The job order price is, in accordance with Article 6 of the above-numbered contract, hereby adjusted by the increased sum of: $9,-490.00.

By reason of this Change Order, the total price of all work under the job order is hereby changed to: $13,265.00.

3. Completion Date: As a result of the work set forth herein, the completion date of the work under the job order is hereby extended to: 17 November, 1950.

4. Appropriation: The work set forth herein is applicable to the following appropriation, title and account: 1711990.01 24302
079 52900 62383

5. Except as hereby and heretofore amended, all the terms and conditions of the contract and job order remain in full force and effect.

THE UNITED STATES OF AMERICA,

By /s/ J. K. McCUE,
Captain, USN Contracting Officer.

Accepted:

Date Jan. 15, 1951.

TRIPLE "A" MACHINE
SHOP, INC.,
(Contractor).

By .....

EB

[Endorsed]: Filed October 1, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, respondent above named, and for answer to the libel herein denies, admits, and alleges as follows:

I.

Answering unto Article I of said libel respondent has no knowledge or information sufficient to answer said allegations, and upon that ground denies the same.

II.

Answering Article II of said libel, respondent admits the allegations thereof.

III.

Answering Article III of said libel, respondent admits the allegations thereof.

IV.

Answering Article IV of said libel, respondent admits the allegations thereof.

V.

Answering Article V of said libel, respondent denies the allegations thereof, and alleges that "the contract" referred to in Article IV of the libel incorporates all of the provisions of and terms of the agreement entered into as between libelant and respondent; further answering said Article V, respondent alleges that said sum of $3,775.00 has been paid in full by respondent to libelant.

Answering Unto the Alleged, Further and Second Claim of Libelant, Respondent Denies, Admits and Alleges as Follows:

I.

Answering Article I of said Second Cause of Action or Libel, respondent refers to, and by such reference incorporates herein as if set forth at length, all of the denials, admissions and allegations contained in its answer to Articles I, II, III, IV, and V of its answer to libelant's First Cause of Action or Libel hereinabove set forth.

II.

Answering unto Article II of said Second Cause of Action or Libel, respondent alleges that on October 15, 1950, respondent and libelant entered into a certain agreement, copy of which is attached to the Libel marked Exhibit "B," pursuant to a Master

Contract hereto attached, marked respondent's Exhibit "A"; and that the work provided therein to be performed by libelant was performed and completed on or about the 15th day of November, 1950. That the value of the work so performed and the payment therefor is provided for in that certain agreement attached to the Libel marked Exhibit "B." Except as otherwise herein admitted or denied, respondent denies each and every, all and singular, the allegations of said Article II.

III.

Answering Article III of said Second Cause of Action or Libel, respondent denies the allegations thereof. Further answering said Article III, respondent alleges that said sum of $9,490.00 has been paid in full by respondent to libelant.

Answering Unto the Alleged, Further and Third Claim of Libelant, Respondent Denies, Admits and Alleges as Follows:

I.

Answering Article I of said Third Cause of Action or Libel, respondent refers to, and by such reference incorporates herein as if set forth at length, all of the denials, admissions and allegations contained in its answer to Articles I, II, III, IV and V of its answer to libelant's First Cause of Action or Libel hereinabove set forth.

II.

Answering Article II of said Third Cause of Action or Libel, respondent alleges that all of the

work provided or agreed to be performed by libelant is set forth in said Exhibits "A" and "B" attached to the Libel, issued pursuantly to Master Contract, hereto attached marked respondent's Exhibit "A," and not otherwise or at all. Except as herein admitted respondent denies each and every, all and singular, the allegations of said Article II.

III.

Answering Article III of said Third Cause of Action or Libel, respondent denies the allegations thereof.

For a First, Separate, and Affirmative Defense Respondent United States of America Alleges:

I.

That this Court does not have jurisdiction of the alleged causes of action set forth in the libel under the provisions either of the Public Vessels Act (46 U. S. C. 781, et seq.) or the Suits in Admiralty Act (46 U. S. C. 741, et seq.), in that the action is based upon contract, which cause of action, if any, is under the exclusive jurisdiction of the Court of Claims.

For a Second, Separate and Affirmative Defense, Respondent United States of America Alleges:

I.

That on the 10th day of February, 1950, the respondent United States of America, through its agency, the Military Sea Transportation Service, en-

tered into a "Master Contract for Repair and Alteration of Vessels," Contract No. MST-235, with the libelant; a true and correct copy of the said contract is attached hereto, marked Exhibit "A," and is incorporated into and made a part of this answer. Among other provisions, the aforesaid contract provided as follows:

> "(j) The Government does not guarantee the correctness of the dimensions, sizes and shapes set forth in any job order, sketches, drawings, plans or specifications prepared or furnished by the Government, except when a job order requires that the work be commenced by the Contractor prior to any opportunity inspect the vessel. The Contractor shall be responsible for the correctness of the shape, sizes and dimensions of parts to be furnished hereunder except as above set forth and other than those furnished by the Government. Any questions regarding or arising out of the interpretation of plans or specifications hereunder or any inconsistency between plans and specifications shall be determined by the Contracting Officer subject to appeal by the Contractor to Commander, Military Sea Transportation Service, or his duly authorized representative who shall not be the Contracting Officer. Pending final decision with respect to any such appeal, the Contractor shall proceed diligently with the performance of the work, as determined by the Contracting Officer. If it is determined that the

interpretation of the Contracting Officer is not correct, an equitable adjustment in the job order price shall be made. Any conflict between this contract and any job order, including any plans and specifications, shall be governed by the provisions of this contract."

II.

That on or about the 2nd day of October, 1950, the respondent United States of America, through its agency, the Military Sea Transportation Service, issued a "Job Order No. 10," pursuant to the provisions of the "Master Contract" hereinabove referred to. A true and correct copy of said "Job Order" is attached hereto, marked Exhibit "B," and is incorporated into and made a part of this answer, by the terms of which the libelant was em- hereto attached, marked Exhibit "C," and by reference made a part hereof. Among the provisions, aforesaid lifeboats were prepared by the respondent and were attached to and made a part of said "Job Order No. 10." A copy of said "Specifications" is hereto attached, marked Exhibit "C," and by reference made a part hereof. Among the provisions, the "Specifications" provided as follows:

"It is the intent of these specifications to provide for the complete repair and reconditioning, both mechanically and structurally, of five (5) lifeboats, all as necessary to place the boats in first class operating condition and ready for use.

"The work shall include, but shall not be

VII.

Invitation to bid No. P51-36 "Lifeboats," dated September 21, 1950, issued by Military Sea Transportation Service, Pacific, together with enclosures, photostatic copy of which is attached hereto and marked Exhibit "G."

VIII.

Bid dated September 29, 1950, submitted by Triple "A" Machine Shop to Military Sea Transportation Service, Pacific, photostatic copy of which is attached hereto and marked Exhibit "H."

IX.

Letter from Military Sea Transportation Service, Pacific, to Triple "A" Machine Shop, dated June 16, 1952, copy of which is attached hereto and marked Exhibit "I."

X.

Letter from Captain J. K. McCue, United States Navy, Contracting Officer, Military Sea Transportation Service, Pacific, to Mr. J. Thaddeus Cline, dated 2 November, 1952, copy of which is attached hereto and marked Exhibit "J."

XI.

Letter from Mr. J. Thaddeus Cline to Military Sea Transportation Service, Pacific, dated 28 June, 1951, copy of which is attached hereto and marked Exhibit "K."

XII.

Letter from Captain J. K. McCue, United States Navy, Contracting Officer, to Triple "A" Machine

Shop, dated October 16, 1950, copy of which is attached hereto and marked Exhibit "L."

Request Is Further Made for the Admission of the Following Facts Within Ten (10) Days of Service Hereof:

XIII.

That from October 10, 1950, to and including October 1, 1952, Mr. J. Thaddeus Cline was the duly appointed and acting attorney in fact for Triple "A"' Machine Shop, Inc.

XIV.

That Mr. A. Engel, President, Triple "A" Machine Shop, Inc., was duly authorized to act for the libelant in connection with the signing of the Master Contract for Repair and Alteration of Vessels, copy of which is attached to the respondent's Answer and marked Exhibit "A."

XV.

That Mr. A. Engel was duly authorized on behalf of libelant to sign the "Job Orders" and "Specifications," photostatic copies of which are attached to the respondent's Answer and marked Exhibits "B" and "C."

XVI.

That Mr. A. Engel was duly authorized on behalf of the libelant to sign the bid, photostatic copy of which is attached hereto and marked Exhibit "H."

XVII.

That Mr. A. Engel was duly authorized to act for

the respondents in connection with receiving and acceptance of the invitation to bid, photostatic copy of which is attached hereto and marked Exhibit "G."

XVIII.

That Mr. A. Engel was duly authorized to act for the libelant in connection with the writing of the letter, copy of which is attached hereto and marked Exhibit "E."

XIX.

That respondent has paid to the libelant, and the libelant has received from the respondent, the sum of $13,265.00 paid for as set forth in Government check No. 15,141, photostatic copy of which is attached hereto and marked Exhibit "F."

XX.

That "Mr. Blake" referred to in the letter from Military Sea Transportation Service, Pacific, to Triple "A" Machine Shop, Inc., dated June 16, 1952, copy of which is attached hereto and marked Exhibit "I," was duly authorized to act for and on behalf of the libelant.

XXI.

That libelant, through its representative "Mr. Blake," referred to in the letter from Military Sea Transportation Service, Pacific, to Triple "A" Machine Shop, Inc., dated June 16, 1952, copy of which is attached hereto and marked Exhibit "I," was afforded a hearing on June 6, 1952, before the Contract Advisory Board, Military Sea Transportation Service, Pacific, in connection with the claim of

Triple "A" Machine Shop, Inc., alleged in the libel.

XXII.

That, Commander, Military Sea Transportation Service, Washington, D. C., made a final determination as to the said claim of Triple "A" Machine Shop, and by such decision, rejected libelant's contention that the work performed by libelant was "extra work" and further decided and determined that such work was within the scope of work contemplated by "Job Order No. 10" and the "Specifications," copies of which are attached hereto as Exhibits "B" and "C."

XXIII.

That, Commander, Military Sea Transportation Service, Washington, D. C., by such decision, rejected and denied libelant's claim for extra compensation, for which claim is asserted by libelant in its third cause of action or claim in the libel filed herein.

Dated: March 4, 1953.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General;

/s/ RICHARD J. HOGAN,
Special Assistant to the U. S. Attorney.

limited to, any detailed specifications which follows:

* * *

"All work shall be subject to inspection and approval by the U. S. Coast Guard and the U. S. Navy Inspector assigned."

That the libelant accepted and entered upon performance of the work prescribed by "Job Order No. 10" and in accordance with the aforesaid "Specifications." That prior to completion of the said repairs to the said lifeboats, an inspection was made thereof by the United States Coast Guard and various additional repairs were found to be necessary in order to meet the requirements of the Coast Guard inspectors; such additional repairs were made by the libelant in accordance with the "Master Ship Repair Contract," "Job Order No. 10" and the "Specifications for Repairs" aforesaid; that the aforesaid additional items of repair work performed by the libelant were accomplished and performed solely in conformance with the terms and conditions of the aforementioned "Master Ship Repair Contract," "Job Order No. 10" and the "Specifications."

III.

That pursuant to Article 5, Section (j) of the aforesaid "Master Ship Repair Contract," the libelant was afforded, on June 6, 1952, a hearing before the Contract Advisory Board, Military Sea Transportation Service, Pacific, for the purpose of determining the merits of the issue raised by the libelant, to the effect that "Job Order No. 10" and the

"Specifications for Repairs" did not require or contemplate by their respective terms that the said "additional repairs," referred to in Articles I and II of libelant's Third Cause of Action, were to be made by the libelant without compensation other than such compensation as is provided for in "Job Order No. 10." That the Contract Advisory Board of Military Sea Transportation Service-Pacific, determined, after due deliberation, that the libelant was not entitled to additional compensation for the additional work performed on the said lifeboats, it being determined by the said Contract Advisory Board that the "Specifications" covered in full any and all work which would be required to fully repair the said lifeboats, and the libelant was so advised of the aforesaid determination of the Contract Advisory Board on June 16, 1952. That the Contract Advisory Board acted in accordance with Article 5, Section (j) of the "Master Ship Repair Contract" as the duly authorized representative of Commander, Military Sea Transportation Service. That the decision of Commander, Military Sea Transportation Service, was final and conclusive as to the disputed issue of entitlement of the libelant to additional compensation or reimbursement for additional work performed to complete repairs to the said lifeboats.

Wherefore, respondent prays that the libel herein be dismissed with its costs incurred.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ RICHARD J. HOGAN, JR.,
Special Assistant to the U. S. Attorney, Proctors for Respondent, United States of America.

[Exhibits A, B, and C referred to in the above Answer have been set out as Pre-trial Exhibits and are printed at Pages 25 to 45.]

[Endorsed]: Filed January 7, 1953.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS UNDER RULE 32B, SUPREME COURT ADMIRALTY RULES

To: Triple "A" Machine Shop, Inc., Plaintiff above named, and to J. Thaddeus Cline, its Attorney:

Please take notice that the respondent hereby requests the libelant, pursuant to Rule 32B of the Supreme Court Admiralty Rules, to admit within ten (10) days after service of this request, the genuineness of the following documents:

I.

Contract No. MST 235, designated as "Master Contract for Repair and Alteration of Vessels," between United States of America and Triple "A" Machine Shop, Inc., dated February 10, 1950, mime-

ographed copy of which is attached to the Answer of the United States in the above-entitled cause and marked Exhibit "A."

II.

Job Order No. 10, Contract No. MST 235, entitled "Repair to Lifeboats," dated October 2, 1950, photostatic copy of which is attached to the Answer of the United States in the above-entitled cause and marked Exhibit "B."

III.

Specification No. MSTS P 51-64 "Specifications for Repairs to Five Lifeboats," dated September 20, 1950, photostatic copy of which is attached to the Answer of the United States in the above-entitled cause and marked Exhibits "B" and "C."

IV.

Public Voucher No. 49497 dated January 31, 1951, in the amount of $13,265.00, photostatic copy of which is attached hereto and marked Exhibit "D."

V.

Letter from Triple "A" Machine Shop to Military Sea Transportation Service, Pacific, dated January 16, 1951, copy of which is attached hereto and marked Exhibit "E."

VI.

U. S. Treasury check No. 15,151 in the amount of $13,265.00, payable to Bank of America, Columbus Branch, assignee for Triple "A" Machine Shop, photostatic copy of which is attached hereto and marked Exhibit "F."

EXHIBIT A

(Joint Exhibit No. 1)

(Copy)

Contract No MST 235

Date Feb. 10, 1950

Department of the Navy

(Military Sea Transportation Service)

Master Contract

for

Repair and Alteration of Vessels

Between

United States of America

and

Triple "A" Machine, Shop, Inc.

San Francisco, Calif.

A True Copy:

/s/ E. S. CARMICK,
Captain, USN.

Conformed Copy

Now Therefore, the parties hereto do mutually agree as follows:

Article 1. Purpose

The purpose of this contract is to establish the terms upon which the Contractor will effect repairs, completions, alterations of and additions to vessels of the Government under job orders issued by the Contracting Officer from time to time under this contract.

Article 2. Preliminary Arrangements

(a) Whenever the Government shall invite the Contractor to submit a bid or quotation for the repair, completion, alteration of or addition to a vessel, the Contracting Officer shall notify the Contractor of (i) the nature of the work to be performed, (ii) the location where the work is to be performed, and (iii) the date the vessel will be available to the Contractor and the date the work is to be completed. Unless the notice otherwise states, bids shall be submitted on the basis that the work will be performed at the Contractor's plant. Upon receipt of such notification, the Contractor shall promptly advise the Contracting Officer whether or not the Contractor is willing and able to perform the work.

(b) In the event the Contractor is willing and able to perform the work, the Contractor and the Contracting Officer, either before or after the arrival of the vessel at the location where the work is to be

performed, shall inspect the items of work to be accomplished on such vessel, and the Contractor shall as soon as practicable thereafter, as requested by the Contracting Officer, submit a bid or negotiate for the performance of the work. If the Contracting Officer requests the Contractor to negotiate, it shall, as promptly as possible, after inspection of the work, quote a price for which it will perform the work in accordance with plans and specifications furnished or to be furnished by the Government and will submit therewith a breakdown in such detail as the Contracting Officer may reasonably request of the estimated cost of performing such work, but in any case indicating the estimated cost of (i) direct labor, (ii) material, (iii) overhead and (iv) any amount included for contingencies and profit. If the Contracting Officer requests the Contractor to submit a bid, it shall as promptly as possible after inspection of the work submit a bid for the performance of the work in accordance with plans and specifications furnished or to be furnished by the Government.

Article 3. Job Orders and Compensation

(a) If on receipt of the Contractor's bid or quotation and any other bids or quotations which the Contracting Officer may obtain, the Contracting Officer determines that the work should be awarded to the Contractor, the price for the work shall be set forth in a job order, and such job order shall be signed and issued by the Contracting Officer, and signed and acknowledged by a duly authorized

officer or other representative of the Contractor. Such job order shall be substantially in the form attached hereto as Exhibit A and shall be deemed to incorporate the terms and provisions of this contract.

* * *

Article 4. Performance

(a) Upon the issuance of a job order, the Contractor shall promptly commence the work specified therein and in any plans and specifications made a part thereof, and shall diligently prosecute the work to completion to the satisfaction of the Contracting Officer. The Contractor shall not commence work until the job order has been issued, except in the case of emergency work requested by the Contracting Officer as provided in paragraph (b) of Article 3.

(b) The Government shall deliver the vessel described in the job order to such location as may be specified in the job order for the performance of the work, and upon completion of the work the Government shall accept delivery of the vessel at such location. If the Government shall require the Contractor to move the vessel after delivery to the Contractor, a change order under Article 6 shall be issued. All other changes in location of the vessel durthe performance of the work shall be at the expense of the Contractor.

(c) The Contractor shall, without charge and without specific requirement therefor in a job order:

(i) Make available existing washroom and similar facilities at the Plant to personnel of the vessel while in drydock or on a marine railway, and supply and maintain in a condition satisfactory to the Contracting Officer suitable brows and gangways from drydock or marine railway to the vessel;

(ii) Store salvage, scrap or other ship's material of the Government as may be specified by the Contracting Officer in the Plant for a period not exceeding 60 days from the completion of the work to be accomplished under the job order and

(iii) Perform, or pay the cost of, any repairing, reconditioning, or replacing rendered necessary as the result of the use by the Contractor of any of the vessel's machinery, equipment or fittings, including winches, pumps, rigging, or pipe lines (any such use to be at the Contractor's own risk).

(d) The Contractor shall furnish all necessary material, labor, services, equipment, supplies, power, accessories, facilities, and such other things as are necessary for accomplishing the work specified in the job order subject to the right reserved in the Government under Article 5 (i).

(e) Dock and sea trials of the vessel when required by the Government shall be specified in the job order. During the conduct of such trials the vessel shall be under the control of the vessel's commander and crew with representatives of the Contractor and the Government on board to determine whether or not the work done by the Contractor has

been satisfactorily performed. Dock and sea trials not specified by the job order which the Contractor requires for his own benefit shall not be undertaken by the Contractor without prior notice to and approval of the Contracting Officer, and all such trials shall be conducted at the risk and expense of the Contractor.

(f) The Contractor shall provide and install all fittings and appliances which may be necessary for the dock and sea trials to enable the representatives of the Government to determine whether the requirements of the job order, plans and specifications have been met, and the Contractor shall be responsible for the care, installation and removal of instruments and apparatus furnished by the Government for such trials.

Article 5. Inspection and Manner of Doing Work

(a) Work shall be performed hereunder in accordance with the job order, and any plans and specifications made a part thereof, as modified by any change order issued under Article 6.

(b) Unless otherwise specifically provided in the job order, all operational practices of the Contractor and all workmanship and material, equipment and articles used in the performance of work hereunder shall be in accordance with the rules of the American Bureau of Shipping, the requirements of the U. S. Coast Guard, the rules of the American Institute of Electrical Engineers, and the best com-

mercial marine practices. Standards other than the foregoing shall be specifically set forth in the job order.

(c) All material and workmanship shall be subject to inspection and test at all times during the Contractor's performance of the work to determine their quality and suitability for the purpose intended and compliance with job order. In case any material or workmanship furnished by the Contractor is found prior to delivery of the vessel to be defective, or not in accordance with the requirements of the job order, the Government, in addition to its rights under Article 11, shall have the right to reject such material or workmanship, and to require its correction or replacement by the Contractor at the Contractor's cost and expense. If the Contractor fails to proceed promptly with the replacement or correction of such material or workmanship, as required by the Contracting Officer, the Government may, by contract or otherwise, replace or correct such material or workmanship and charge to the Contractor the excess cost occasioned the Government thereby.

* * *

(j) The Government does not guarantee the correctness of the dimensions, sizes and shapes set forth n any job order, sketches, drawings, plans or specifications prepared or furnished by the Government, xcept when a job order requires that the work be ommenced by the Contractor prior to any opportunity to inspect the vessel. The Contractor shall be

responsible for the correctness of the shape, sizes and dimensions of parts to be furnished hereunder except as above set forth and other than those furnished by the Government. Any questions regarding or arising out of the interpretation of plans or specifications hereunder or any inconsistency between plans and specifications shall be determined by the Contracting Officer subject to appeal by the Contractor to Commander, Military Sea Transportation Service, or his duly authorized representative who shall not be the Contracting Officer. Pending final decision with respect to any such appeal, the Contractor shall proceed diligently with the performance of the work, as determined by the Contracting Officer. If it is determined that the interpretation of the Contracting Officer is not correct, an equitable adjustment in the job order price shall be made. Any conflict between this contract and any job order, including any plans and specifications, shall be governed by the provisions of this contract.

* * *

Article 14. Disputes

Any disputes concerning a question of fact or price arising under this contract or under any job order or plans or specifications (other than matters to be determined by the Contracting Officer under Article 5(j) hereof) which is not disposed of by agreement between the Contractor and the Contracting Officer shall be referred to and decided by Commander, Military Sea Transportation Service, whc

shall furnish by mail or otherwise to the Contractor a copy of his decision. Within 30 days from the date of receipt of such copy, the Contractor may appeal such decision by mailing or otherwise furnishing to Commander, Military Sea Transportation Service, a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for hearing of such appeal shall be final and conclusive; provided that, if no such appeal is taken, the decision of Commander, Military Sea Transportation Service, shall be final and conclusive. In connection with any appeal from a decision by Commander, Military Sea Transportation Service, under this Article within the time limit herein specified, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract.

* * *

JOINT EXHIBIT No. 2

(Exhibit B)

Military Sea Transportation Service, Pacific
33 Berry Street
San Francisco 7, California

To: Triple "A" Machine Shop, Inc.,
Pier 64,
San Francisco 7, California.

Date: 2 October 1950.

Job Order No.: 10.

Contract No.: MST 235.

Repair to Lifeboats.

This Job Order issued pursuant to the provisions of the above-numbered contract, the terms of which by this reference are made a part hereof, Witnesseth That:

1. Work: The Contractor shall furnish the supplies and services required to perform the work described in the attached plans and specifications made a part hereof and designated as follows: Repairs to Five (5) Lifeboats, Specification No. MSTSP 51-64.

2. Price: The Government will pay the Contractor for the performance of this Job Order the following listed sum plus an amount at the unit prices on the reverse side hereof for the units specified and

furnished under Article 3 (c) of the above-numbered contract: $3,775.00.

3. Commencement and completion dates: The work will be performed at Contractor's plant.

Contractor shall commence work on: 2 October, 1950.

Work shall be completed on or before: 11:00 a.m., 27 October, 1950.

4. Liquidated Damages: Pursuant to the Article of the said contract entitled "Default," the damages payable for each calendar day of delay shall be $100.00.

5. Appropriation Chargeable: The work is chargeable to the following appropriation, title and account:

1711990.01 24302
079 52900 62383

Payment to the Contractor will be made by the Government through the Navy Regional Accounts Office at Oakland, California.

6. This Job Order is issued pursuant to the authority of the Armed Services Procurement Act of 1947, Section: 3.

THE UNITED STATES OF AMERICA,

By .....,
J. K. McCUE,
Captain, USN,
Contracting Officer.

JOINT EXHIBIT No. 2

(Exhibit B)

Military Sea Transportation Service, Pacific
33 Berry Street
San Francisco 7, California

To: Triple "A" Machine Shop, Inc.,
Pier 64,
San Francisco 7, California.

Date: 2 October 1950.

Job Order No.: 10.

Contract No.: MST 235.

Repair to Lifeboats.

This Job Order issued pursuant to the provisions of the above-numbered contract, the terms of which by this reference are made a part hereof, Witnesseth That:

1. Work: The Contractor shall furnish the supplies and services required to perform the work described in the attached plans and specifications made a part hereof and designated as follows: Repairs to Five (5) Lifeboats, Specification No. MSTSP 51-64.

2. Price: The Government will pay the Contractor for the performance of this Job Order the following listed sum plus an amount at the unit prices on the reverse side hereof for the units specified and

furnished under Article 3 (c) of the above-numbered contract: $3,775.00.

3. Commencement and completion dates: The work will be performed at Contractor's plant.

Contractor shall commence work on: 2 October, 1950.

Work shall be completed on or before: 11:00 a.m., 27 October, 1950.

4. Liquidated Damages: Pursuant to the Article of the said contract entitled "Default," the damages payable for each calendar day of delay shall be $100.00.

5. Appropriation Chargeable: The work is chargeable to the following appropriation, title and account:

1711990.01 24302
079 52900 62383

Payment to the Contractor will be made by the Government through the Navy Regional Accounts Office at Oakland, California.

6. This Job Order is issued pursuant to the authority of the Armed Services Procurement Act of 1947, Section: 3.

THE UNITED STATES OF AMERICA,

By .....,
J. K. McCUE,
Captain, USN,
Contracting Officer.

Accepted:

Date: October 11, 1950.

TRIPLE "A" MACHINE
SHOP, INC.,
(Contractor.)

Dp

By /s/ A. ENGEL,
President.

Certified to be a true copy.

(Exhibit C)

Military Sea Transportation Service, Pacific
33 Berry Street
San Francisco 7, California

Specification Number: MSTSP 51-64
20 September, 1950
Specifications
for
Repairs to Five (5) Lifeboats

Work to start on or about: 2 October, 1950.

All work to be completed on or before: 27 October, 1950—1100.

These specifications consist of 5 pages of which this is page 1.

Planner—Dalzell.

Certified to be a true copy.

/s/ E. L. HAYMOND.

It is the intent of these specifications to provide for the complete repair and reconditioning, both mechanically and structurally, of five (5) lifeboats, all as necessary to place the boats in first class operating condition and ready for use.

The work shall include, but shall not be limited to, any detailed specifications which follow:

The contractor shall furnish all labor, materials, transportation and all other equipment necessary to completely repair four (4) #13 and #14 gauge galvanized steel hulls and one (1) aluminum hull lifeboats now located in Rows Numbers 1 and 4 open storage space adjacent to Warehouse 3, Oakland Army Base. On award of the contract, the contractor shall immediately remove all five (5) lifeboats from Oakland Army Base to his plant for the accomplisment of the repairs. The Government will supply loading facilities.

All work shall be subject to inspection and approval by the U. S. Coast Guard and the U. S. Navy Inspector assigned.

The interior of each of the five (5) lifeboats shall be completely stripped of all equipment.

All food, water, gear or provision lockers or tanks shall be opened up for internal examination and cleaning. Replace all missing or defective filling caps, access covers, drop bolts, wing nuts, gaskets, and parts of like nature. All water, provision, and air tanks shall be tested and proven tight. Air tanks

shall be tested at one (1) pound per square inch air pressure.

Replacements of deteriorated tanks shall be accomplished only on a written field order.

When all hull repairs are completed, each boat shall be tested by filling with water and proven watertight.

All rudders and tillers shall be repaired or replaced where missing, properly painted and rudder fittings shall be faired, repaired or replaced where necessary.

Furnish new any missing or repair any defective oar locks, retaining chains or miscellaneous fittings attached to hulls. Reshape where necessary.

Examine and free up all releasing gear fittings. Replace missing or renew defective parts. Lubricate and leave in operable condition.

After each boat has been proven watertight, remove all blistered or loose paint from both interior and exterior of hull; clean to bare metal where directed, prime coat bare spots, and paint both interior and exterior with one (1) finish coat to match that now used on the boats.

Clean and paint interior and exterior of all food, provision or gear lockers or tanks. Clean and paint the exterior of all air tanks. Clean and paint both sides of all floor boards and seats.

Reinstall all equipment removed from each boat and leave ready for use.

Upon completion of all work, deliver all boats to Naval Supply Center, Oakland, California.

Detailed descriptions, specifications, and locations of the five (5) lifeboats are as follows:

One (1) Boat—Gas Driven:

Length	26′0″
Beam	9′0″
Depth	3.8′
Capacity—43 persons	

Builder: Welin Davit Boat Corporation, Perth Amboy, New Jersey.

Four (4) Boats—Type (Hand Propelled).

Length	30.66 feet
Beam	10.16 feet
Depth	4.25 feet
Capacity—77 persons	

Builder: Welin Davit Boat Corporation, Perth Amboy, New Jersey.

Category "A" Items

Item 1—Repair Gas Driven Boat—43 Persons:

$3,375.

Code 110

Boat (Gas driven), Serial #A14597, Location Row #4, Space 22.
Builder: Welin Davit & Boat Corporation.

Open and examine gas engine (Gray Marino Lugger Sea Scout 91, 4 cyl., Engine #D20387) and

completely overhaul the engine and accessories. The Contractor shall remove the head, disassemble the engine and examine all moving parts. The contractor shall examine valves, seats, springs and keepers, grind valves and seats or replace same if found to be beyond economical repair, clean and remove carbon. Examine cylinders, pistons, piston rings, rods, bearings, and machine, refit or replace parts found worn or defective, thoroughly clean entire cooling system, remove and overhaul carburetor, distributor, starter, generator, fuel pump and other accessories, replace all worn or defective parts, clean and test gasoline tank and fuel lines from engine to tank, renew all ignition wiring, and starter button, check engine foundation, clean and paint same. Reassemble engine, renew gaskets, defective studs, bolts and nuts, install new spark plugs, examine suction and discharge piping and valves, examine exhaust piping and manifold, repair and/or renew as required to place in serviceable condition. Make all necessary adjustments and tune up engine. Contractor to furnish material, labor and equipment and test engine. Examine, repair and adjust clutch and make up coupling.

Open up the bilge pump (hand operated), examine, clean, free up, repair as necessary, assemble, renew suction and discharge hoses and test.

The contractor shall remove propeller and propeller shaft, check shaft for straightness, straighten and polish as required, clean and examine propeller, fair in leading and trailing edges, examine and clean

stern tube and stuffing box, reinstall propeller and shaft, repack stuffing box and test for operation.

Item 2—Repair Four (4) Lifeboats—77 Persons:

$400.

Code 110

Boats (Hand Propelled), Serial Numbers A-5375, A-5114, A-5095 and A-5160.

Location: Row #1, Spaces 6, 15, and 16. Row #4, Space 11, respectively.

Builder: Welin Davit & Boat Corporation.

Boat #A-5375

Remove starboard side bilge plate amidships, straighten to its original shape and contour and reinstall. (Approximately fifteen (15) square feet.) Remove indentations from port side to restore shell to its original shape and contour as when new. (Approximately six (6) square feet.)

Boats #A-5114 and A-5095

Remove indentations from port and starboard shell to restore to its original shape and contour as when new. (Approximate total damage both boats twenty (20) square feet.)

Boat #A-5160

Remove port side bilge plate amidships, straighten to its original shape and contour and reinstall. (Approximately fifteen (15) square feet.) Remove

small indentation from starboard side to restore shell to its original shape and contour as when new.

Remove, reshape and/or renew the port and starboard grab rails and securing brackets.

Remove propellers and propeller shafts, check shafts for straightness, straighten and polish as required, clean and examine propellers, fair in leading and trailing edges, examine and clean stern tube bearings and stuffing boxes, reinstall propellers and shafts, repack stuffing boxes and prove operable.

Open up and examine transmission, gears, shafts and bearings, clean up and make minor repairs to put same in operable condition. Repairs to or replacements of damaged or missing parts shall be accomplished only on a duly authorized writtten Field Order. Reassemble transmissions and fill with proper lubricant. Examine and free up propelling mechanisms (hand operated) and associated fittings, free up, renew missing or deteriorated pins, screws, bolts, nuts and propelling handles, lubricate, assemble and make operable.

Open up bilge pumps (hand operated), examine, clean, free up, repair as necessary, assemble, renew suction and discharge hoses, and test.

Military Sea Transportation Service, Pacific
33 Berry Street
San Francisco 7, California

To: Triple "A" Machine Shop, Inc.,
Pier 64,
San Francisco 7, California.

Date: 27 November, 1950.

Change Order "A" to Job Order No.: 10.

Contract No.: MST 235.

Repair to Lifeboats.

This Change Order issued pursuant to the provisions of the above-numbered job order and contract, Witnesseth That:

1. Work: The Contractor shall make changes in the job order in accordance with the work described in the attached specifications made a part hereof and designated as follows: Addition No. 1 to Specification No. MSTSP 51-01.

2. Price: The job order price is, in accordance with Article 6 of the above numbered contract, hereby adjusted by the increased (decreased) sum of: $9,490.00.

By reason of this Change Order, the total price of all work under the job order is hereby changed to: $13,206.00.

3. Completion Date: As a result of the work set

forth herein, the completion date of the work under the job order is hereby extended to: 17 November, 1950.

4. Appropriation: The work set forth herein is applicable to the following appropriation, title and account: 1711990.01 24302
079 52900 62383

5. Except as hereby and heretofore amended, all the terms and conditions of the contract and job order remain in full force and effect.

THE UNITED STATES OF AMERICA,

By J. N. MOSES,
Captain, U.S.N.,
Contracting Officer.

Certified to Be a True Copy:

/s/ E. L. HAYMEND.

Accepted:

Date.....

.....,
(Contractor)

By .....

Military Sea Transportation Service, Pacific Area
33 Berry Street
San Francisco 7, California

Specification Number: MSTSP 51-64
27 November, 1950
Addition Number 1
to
Specifications
for
Repairs to Five (5) Lifeboats
Contractor: Triple "A" Machine Shop

These specifications consist of page 6 only.

Item 2—Repair Four (4) Lifeboats—77 Persons
(Addendum Number 1)

Code 110

Furnish all labor and material necessary to renew 146 air and provision tanks for four (4) metal lifeboats as follows:

Life boat No. A-5375, 32 Tanks
" No. A-5160 38 Tanks
" No. A-5114 35 Tanks
" No. A-5095 41 Tanks

Tanks to be similar in all respects to ones replaced and tested to 1# air pressure in presence of U.S.C.G. and MSTSP Inspector. Confirming Field Order Number 1, dated 10 October, 1950.

WRD/ts

Certified to Be a True Copy:

/s/ E. L. HAYMEND.

Standard Form No. 1034, Revised
Form prescribed by
Comptroller General
September 1, 1950
(Item Reg. No. 51, Supp. No. 111)

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

G. Voucher No. 49497
Sh. Voucher No.

U. S. DEPARTMENT OF THE NAVY
310 U. S. Navy Regional Accounts Office
(Department, bureau, or establishment)

1-30-51 WELSH
ABRAMS

Voucher prepared at Oakland, California
(City, place and date)

PAID BY
JAN 31 1951
C. I. SHAW
SYMBOL 540052
(For use of Paying Office)

THE UNITED STATES, Dr.

Payee's Account No.

To BANK OF AMERICA, COLUMBUS BRANCH, ASSIGNEE FOR TRIPLE "A" MACHINE SHOP INC
(Payee)
1455 STOCKTON ST.,
SAN FRANCISCO, CALIF.
(State)

No. and Date of Order	Date of Delivery or Service	ARTICLES OR SERVICES (Enter descriptions, item number of contract or Federal supply schedule, and other information deemed necessary) Discount Terms	QUANTITY	UNIT PRICE Cost	UNIT PRICE Per	AMOUNT Dollars	AMOUNT Cts.
CHANGE ORDER "A" JOB ORD. #10	10-2-50 THRU 11-17-50	TO PER ATTD INV. 1-16-51 NOTICE OF ASSIGNMENT PAPERS ATTD TO DOV NO. 46315 PD. 1/27/51 SYMBOL 540052 SERVICES FOR MSTS PACIFIC, 33 BERRY ST., SAN FRANCISCO, CALIF.				13265	0

PAYMENT
Complete ☐
Partial ☐
Final ☐

(Continuation sheet(s) if necessary)

Shipped from to Weight Government B/L No. Total 13265 0

I certify that the above bill is correct and just and that payment thereof has not been received.

(Sign original only)

Date *Payee

*The numbers and names of the creditors must be given in order to secure full credit.

Per Title

(Payee must NOT use this space)
Differences

Account verified, correct for
(Signature or initials)

Contract No. MST 235 Date Req. No. Date Invoice Rec'd.

Pursuant to authority vested in me, I certify that this account is correct and proper for payment.

I Approved for $

By SIGN ORIGINAL ONLY

Title

$

(Authorized Certifying Officer)

Title G C WON AUDITOR

Date

THE REVERSE OF THIS FORM MUST BE EXECUTED WHEN PURCHASES ARE MADE OR SERVICES SECURED WITHOUT FORMAL AGREEMENT IN ANY FORM

ACCOUNTING CLASSIFICATION (For completion by Administrative Office)

Appropriation, limitation, or project symbol	Appropriation title			Limit'n. or Proj't. (Amount)	Appropriation (Amount)
1711990 01	NMF 51	079	52900	62383	13,265.0

Allotment symbol	Amount	Obligations liquidated	COST ACCOUNT Symbol	COST ACCOUNT Amount	OBJECTIVE CLASSIFICATION Symbol	OBJECTIVE CLASSIFICATION Amount
24302					NO STUB	

Paid by Check No. 15141 Dated 19 for $
on 19 Payee
on Treasurer of the United States in favor of payee named above.

EXHIBIT D
(Pre-trial Ex. No. 7)

EXHIBIT E

(Pre-Trial Ex. No. 8)

Phone: YUkon 6-5836

Triple "A" Machine Shop, Inc.
General Ship Repairs
Pier 64
San Francisco 7, Calif.

16 January, 1951.

Military Sea Transportation Service, Pacific
Maintenance & Repair Division,
33 Berry Street,
San Francisco, California.

Services performed on Repair to Lifeboats (5) commencing 2 October, 1950, and completed 17 November, 1950, per Change Order "A" to Job Order No. 10. Contract No. MST 235.

Total Contract Price: $13,265.00.

These moneys have been assigned to the Bank of America, Columbus Branch, 1455 Stockton Street, San Francisco.

/s/ A. ENGEL.

I hereby certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American pro-

duction and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that State or local sales taxes are not included in the amounts billed.

TRIPLE "A" MACHINE
SHOP, INC.,
Name of Contractor or Vendor.

By /s/ A. ENGEL,
President.

Certificate of Naval Inspector

Pursuant to authority vested in me, I certify that the work and materials covered by the above-mentioned Job Order was duly performed, delivered and accepted by me under the Contract Number above. Approved for $13,265.00.

/s/ W. F. WILLITS,
Head Inspector, MSTSPAC.

Date 1-20-51.

NAVY
13,265.00

OAKLAND, CALIF. JAN 31 1951 1-37 15, 141

Treasurer of the United States 15-51 000

PAY $*13,265. DOLLARS AND 00 CENTS $*13,265.00

TO THE ORDER OF

BANK OF AMERICA, COLUMBUS BRANCH, ASSIGNEE FOR TRIPLE "A" MACHINE SHOP INC., SAN FRANCISCO, CALIF.

OFFICER WHICH DRAWS

Vo. No.
49497

540,052

KNOW YOUR ENDORSER—REQUIRE IDENTIFICATION

EXHIBIT F
(Respondent's Pre-trial Ex. No. 6

IDENTIFICATION PROCEDURE
Before cashing this check, be sure you know the payee. You will require identification and endorsement in your presence. Failure against endorsers may otherwise result

The payee must endorse below in ink or indelible pencil.
If the endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their places of residence in full.
It is suggested that this check be promptly negotiated.

PAY TO THE ORDER OF
BANKER OR TRUST CO.
BANK OF AMERICA N.T. & S.A.
SAN FRANCISCO, CALIF.
11-35 21
FEB 2 '51 0268

1-37

JOINT EXHIBIT No. 3

(Respondent's Ex. G)

(Pre-Trial Ex. No. 4)

Military Sea Transportation Service, Pacific
33 Berry Street
San Francisco 7, California

Date: 21 September, 1950

Invitation No.: P51-36

Vessel: Lifeboats

Opening Date for This Bid

Date: 29 September, 1950

Hour: 3:00 p.m. (Pacific Standard Time)

Sealed bids, to perform the work specified in the Schedule designated below and submitted in accordance with attached instructions to bidders, will be received at Military Sea Transportation Service, Pacific, 33 Berry Street, San Francisco, California, and then publicly opened on the above date and hour. Schedule No. P51-36-1.

Schedule No. P51-36-1

Invitation No.: P51-36

Vessel: Lifeboats

1. The lifeboats will be made available for inspection by prospective bidders at:

Oakland Army Base at 9:00 a.m., 21 September, 1950.

2. The location where the work is to be performed will be:

Contractor's plant.

3. The work is to commence:
On award of job, on or about 2 October, 1950.

4. The work shall be completed on or before:

11:00 a.m., 27 October, 1950.

5. Liquidated damages shall be payable by the contractor to the Government in accordance with Article 13 of the MSTS Master Contract for Repair and Alteration of Vessels at the following listed rate per calendar day for any delay beyond the time of completion stated in the contractor's bid:

$100.00.

6. The following drawings and specifications accompany this schedule and, upon the issuance of a Job Order, become a part thereof:

Specification No. MSTSP 51-64.
Repairs to Five (5) Lifeboats.

7. The successful bidder will receive prompt notification of award by the issuance of a Job Order under the MSTS Master Contract for Repair and Alteration of Vessels which the bidder agrees to accept if the Job Order is in accordance with the bid.

8. The successful bidder will furnish to the Contracting Officer a breakdown of the total bid show-

ing the price for each item, such breakdown to be furnished immediately after the issuance of a Job Order to the successful bidder.

9. Unless otherwise specified, the work shall be accomplished with the crew aboard, and the Contractor will schedule the work insofar as is reasonably practicable so as not to interfere with the loading, fueling or other work in the vessel, and the Contractor will perform all items relating to the examination of equipment which may require additional work, as soon as is reasonably possible.

10. Drawings are the property of the Government and shall not be used for any purpose other than that contemplated by the Schedule, and shall be returned upon request to the Contracting Officer.

11. For the purpose of awarding Job Orders, unit prices for work, if any, specified in Category B or Category C will be extended to cover the tentative estimated number stated in the Specifications. However, the Contractor may be required to furnish at the unit price the maximum number of units necessary to accomplish the work described in the Specifications.

12. An original and seven copies of invoices will be submitted to the Contracting Officer.

13. If the bidder, by checking the appropriate box provided therefor in his bid, has represented that he has employed or retained a company or person (other than a full-time employee) to solicit or secure this contract, he may be requested by the

Contracting Officer to furnish a complete Standard Form No. 119, "Contractor's Statement of Contingent or Other Fees for Soliciting or Securing Contract." If the bidder has previously furnished a complete Standard Form No. 119 to the office issuing this invitation for bids, he may accompany his bid with a signed statement, (a) indicating when such completed Form was previously furnished, (b) identifying by number the previous invitation for bids or contract, if any, in connection with which such Form was submitted, and (c) representing that the statements in such Form are applicable to this bid.

Instructions to Bidders

1. Form, Content, and Submission of Bid.

(a) Bids shall be submitted in triplicate upon the prescribed forms furnished to bidders and in compliance with the requirements given thereon and with these instructions. All designations and prices shall be set forth fully and clearly. Erasures or other changes in the bids shall be explained or noted over the signature of the bidder. Bids not submitted on prescribed forms may be rejected. Telegraphic bids will not be considered unless authorized in the accompanying Schedule. Telegraphic modifications of written bids, however, will be considered if received prior to the time fixed for the opening of the bids.

(b) Each bid shall contain the full business address of the bidder and shall be signed by him with

his usual signature. Bids by partnership shall contain the full names of all partners and shall be signed with the partnership name by one of the members of the partnership or by an authorized representative, followed by the signature and designation of the person signing. Bids by corporations shall be signed with the legal name of the corporation, followed by the name of the State of incorporation and by the signature and designation of the president, secretary, or other persons authorized to bind it in the matter. The corporate seal shall likewise be affixed to the bid if requested by the Contracting Officer. The name of each person signing shall also be typed or printed below the signature. A bid by a person who affixes to his signature the word "president," "secretary," "agent," or other designation without disclosing his principal, may be held to be the bid of the individual signing. When requested by the Contracting Officer, satisfactory evidence of the authority of the officer signing in behalf of the corporation shall be furnished.

(c) Bids must be enclosed in sealed envelopes addressed to the activity issuing the Invitation, with the name and address of the bidder, the date and hour of the opening, and the Invitation number written at the top left corner of the envelope. If the bid is mailed the sealed envelope containing the bid shall be further enclosed in a mailing envelope addressed to the Contracting Officer at the activity issuing the Invitation.

2. Time for Receiving Bids.

Bids received prior to the time of opening will be kept unopened. The person whose duty it is to open them will decide when the specified time has arrived, and no bid received thereafter will be considered unless it arrives by mail after the time fixed for opening but before award is made, and it is shown to the satisfaction of the Contracting Officer that the non-arrival on time was caused solely by delay in the mails.

3. Withdrawal of Bids.

Bids may be withdrawn by written or telegraphic request provided such request is received at the activity issuing the Invitation prior to the time fixed for the opening of the bids.

4. Opening of Bids.

At the time fixed for the opening of the bids, their contents will be made public for the information of bidders and others properly interested, who may be present either in person or by representative.

5. Acceptance of Bid and Issuance of Job Order.

(a) The acceptance of the bid and issuance of a Job Order to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government price and other factors considered will be made with reasonable promptness after the opening of the bids. The Government reserves the right to make awards in re-

spect of any of the items, to reject any and all bids, to waive any informality in bids, and to make award either on the basis of an individual vessel or any grouping or combination of vessels, whenever such is in the interest of the Government. If the Invitation for Bids, Schedule, or Specifications require submission of bids by categories of items, the bidder is required to bid (1) on all items in Categories A and B, (2) on all or any items in Category C only, or (3) on all items in Categories A and B and all or any items in Category C. Awards shall be made (1) as to Categories A and B, (2) all or any items in Category C, or (3) Categories A, B and all or any items in Category C, as is in the best interest of the Government. Any bid conditioned in whole or in part on the revision or omission of any requirement or provision in the Schedule or accompanying documents as issued to prospective bidders or on the inclusion of any requirement or provision not contained therein will be rejected as a non-responsive bid and no award will be made to a bidder on such bid. The Government reserves the right to require, prior to the issuance of a Job Order, a statement of facts in detail of the business and technical organization and plant of the bidder available for the contemplated work, including the financial resources and experience of the organization in performance of comparable work.

(b) In determining whether or not an award is in the best interest of the Government, factors such as the cost to the Government in delivering the ves-

Category A Items

Repairs to five (5) life boats.

Total Price $3,775.00

Category B Items

Item No.	Price	Item No.	Price
.....	$.....	.....	$.....
.....	$.....	.....	$.....
.....	$.....	.....	$.....
.....	$.....	.....	$.....
.....	$.....	.....	$.....

Category C Items

EXHIBIT I

(Respondent's Pre-Trial Ex. No. 14)

(Copy)

MSTS-3/lnh
Ser 12580M3
16 June 1952.

Triple "A" Machine Shop, Inc.
Pier 64
San Francisco 7, California

Re: Contract MST No. 235—Job Order No. 10; Appeal from decision of Contracting Officer

Gentlemen:

Reference is made to the appeal of your firm from the decision of the Contracting Officer to the effect

that the specifications under Job Order No. 10 of Contract MST No. 235, together with change orders issued by the Contracting Officer, are to be construed to include all work performed by you.

This appeal involves an interpretation of the specifications and hence is properly presented under Article 5(j) of the Contract. It is not considered that you have a right of appeal under Article 14 in as much as no dispute exists with respect to the facts.

Commander, Military Sea Transportation Service, has designated the Contract Advisory Board, of which the Contracting Officer is not a member, to examine the files and review all evidence pertaining to the dispute and to render a final decision. Mr. Blake of your company appeared before the Contract Advisory Board on 6 June, 1952, and discussed the issues involved and advised with respect to the position of the contractor. Upon a full hearing of the evidence and after careful consideration of the arguments presented by Mr. Blake the Contract Advisory Board found that the specifications as bid upon by the contractor and the Job Order as amended by duly issued change orders are to be construed to include all work performed by Triple "A" Machine Shop, Inc., with respect to the lifeboats in question.

Sincerely yours,

Copy to: J. Thaddeus Cline
Attorney at Law
Monadnock Building
San Francisco 3, Calif.

EXHIBIT J

(Respondent's Pre-Trial Ex. No. 10)

(Copy)

MSTSP-411C/71/Bi
L4-3
Serial 11667
2 Nov 1950

Mr. J. Thaddeus Cline
Monadnock Building
San Francisco 5, California

Dear Mr. Cline:

In reply to your letter dated 20 October 1950 covering repairs to five lifeboats under Job Order No. 10, Contract No. MST 235 with Triple "A" Machine Shop, Inc., your attention is invited to the specifications which read in part as follows:

> "It is the intent of these specifications to provide for the complete repair and reconditioning, both mechanically and structurally, of five (5) lifeboats, all as necessary to place the boats in first class operating condition and ready for use.
>
> "The work shall include, but shall not be limited to, any detailed specifications which follow:
>
> "The contractor shall furnish all labor, materials, transportation and all other equipment necessary to completely repair four (4) #13

and #14 gauge galvanized steel hull and one (1) aluminum hull lifeboats now located in Rows Numbers 1 and 4 open storage space adjacent to Warehouse 3, Oakland Army Base. On award of the contract, the contractor shall immediately remove all five (5) lifeboats from Oakland Army Base to his plant for the accomplishment of the repairs. The Government will supply loading facilities.

"All work shall be subject to inspection and approval by the U. S. Coast Guard and the U. S. Navy Inspector assigned."

In view of the foregoing, no additional payment will be made for the work in question.

Very truly yours,

J. K. McCUE,
Captain, USN,
Contracting Officer.

EXHIBIT K

(Copy)

J. Thaddeus Cline
Attorney at Law
Monadnock Building
San Francisco 5, California

June 28, 1951.

Military Sea Transportation Service, Pacific,
33 Berry Street,
San Francisco 7, California.

Re: Job Order No. 10, Contract No. MST 235,
Subject: Placing claim in dispute.

Dear Sirs:

Reference is here made to my letter of October 10, 1950, and your reply dated November 2, 1950, wherein you refuse to compensate the contractor, Triple "A" Machine Shop, Inc., for the extra labor and materials that it was required to furnish on the above designated job.

Pursuant to Article 14 of Master Contract No. 235, demand is hereby respectfully made that the claim of Triple "A" Machine Shop, Inc., for payment of the reasonable value of all labor and materials furnished by said contractor that were not set forth in the specifications for the above designated job be referred to The Commander, Military Sea Transportation Service, for consideration and decision.

It is further requested that a hearing be held by

said Commander, and that said contractor be given notice thereof and permission to attend.

Respectfully yours,

J. THADDEUS CLINE.

JTC:jm

cc: Triple "A" Machine Shop, Inc.

EXHIBIT L

(Respondent's Pre-Trial Ex. No. 12)

(Copy)

MSTSP-411C/DP
L4-3
Ser 11539

16 October, 1950.

Triple "A" Machine Shop, Inc.,
Pier 64,
San Francisco 7, California.

Gentlemen:

Reference is made to Job Order No. 10, under Contract No. MST 235, covering Repairs to Five (5) Lifeboats.

In reply to your verbal request, you are hereby directed to proceed with the following work:

Renew all bands for securing tanks.

Renew twelve (12) shell plates and one (1) shell doubler chafing plate.

Renew two (2) sockets for propelling units.

Renew inboard margin boards on four (4) lifeboats.

Renew all floors in four (4) lifeboats.

Renew two (2) thwarts.

As you have indicated that you expect additional compensation for this work, you are hereby advised that it is considered the work set forth above is covered very fully in Specification No. MSTSP 51-64, copy of which is part of the Job Order.

In the circumstances, no additional payment will be made for this work.

Sincerely yours,

J. K. McCUE,
Captain, USN,
Contracting Officer.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 4, 1953.

[Title of District Court and Cause.]

ADMISSION OF GENUINENESS OF DOCUMENTS

Whereas, the Respondent above named, has made and filed its request herein for Libelant's admission of facts and genuineness of documents pursuant to Rule 32B of Supreme Court Admiralty Rules, and

Whereas, Libelant has inspected the copy of said documents attached to the said request and finds

that the same appear to be in all respects true and correct;

Now, Therefore, the Libelant above named does hereby admit the genuineness of the said documents and facts recited in the said request.

Dated: March 16, 1953.

/s/ J. THADDEUS CLINE,
Attorney for Libelant.

[Endorsed]: Filed March 17, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

I.

Comes now the United States of America, respondent herein, and moves on the pleadings, exhibits, documents and request for admissions on file herein, for dismissal of the above-entitled cause.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General;

/s/ RICHARD J. HOGAN,
Special Attorney, Department of Justice.

[Endorsed]: Filed October 30, 1953.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter came on for pre-trial before the undersigned Judge of the above-entitled Court, on the 5th day of November, 1953, attended by J. Thaddeus Cline as proctor for libelant, and Richard J. Hogan, Jr., Special Attorney, Department of Justice, and Keith R. Ferguson, Special Assistant to the Attorney General, proctors for respondent, whereupon the following Pre-Trial Order was adopted.

Agreed Facts

1. That at all times material herein, libelant was and now is a corporation existing under the laws of the State of California.

2. That at all times material herein respondent United States of America was the owner of five lifeboats.

3. That at all of the times material herein Military Sea Transportation Service, Pacific, was an agency of the respondent United States of America and further that the said Military Sea Transportation Service, Pacific, acted for and on behalf of the respondent United States of America in the ownership, maintenance and repair of said lifeboats.

4. That on or about February 10, 1950, Military Sea Transportation Service, Pacific, under Contract MST-235, entitled "Master Contract for Repair and Alteration of Vessels" entered into a contract and agreement with libelant Triple "A" Machine Shop,

to make repairs, alterations and additions to vessels of the United States Government under Job Orders issued by the Contracting Officer of Military Sea Transportation Service, Pacific. That said contract has been at all times since in full force and effect between libelant and respondent herein as regards all repair work herein referred to.

5. That on September 20, 1950, "Specifications for Repairs" to five lifeboats issued under Specifications No. MSTSP 51-64, were issued.

6. That on September 21, 1950, Military Sea Transportation Service, Pacific, issued Invitation to Bid No. P 51-36, and solicited bids for repairs to five lifeboats on the basis of Specifications No. MSTSP 51-64.

7. That on September 29, 1950, in response to Invitation to Bid No. P 51-36, Triple "A" Machine Shop, Inc., libelant herein, submitted its bid for repairs to five lifeboats for a total price of $3,775.00.

8. That on October 2, 1950, Military Sea Transportation Service, Pacific, accepted the bid of Triple "A" Machine Shop, and issued "Job Order No. 10" under Master Contract MST-235 to Triple "A" Machine Shop, libelant herein, authorizing commencement of repairs to five lifeboats in accordance with Specifications for Repairs No. MSTSP 51-64.

9. That on November 27, 1950, Change Order No. A to Job Order No. 10 under Master Contract No. MST-235, was issued by Military Sea Transportation Service, Pacific, to Triple "A" Machine Shop,

libelant herein, making an addition to Specifications No. MSTSP 51-64 and the job order price as set forth in Job Order No. 10 was adjusted by making an allowance by Military Sea Transportation Service, Pacific, for an increase of $9,490.00, or a total price for all work under Job Order No. 10 and Specifications for Repairs No. 51-64, of $13,265.00.

10. That Triple "A" Machine Shop, libelant herein, has been paid by respondent United States of America the sum of $3,775.00 alleged by libelant to be due and owing under Article V of libelant's First Cause of Claim set forth in the libel filed herein.

11. That Triple "A" Machine Shop, libelant herein, has been paid by respondent United States of America the sum of $9,490.00, alleged by libelant to be due and owing under Articles II and III of libelant's Second Cause of Claim set forth in the libel filed herein.

12. That during the months of October and November, 1950, libelant was required by Military Sea Transportation Service, Pacific, to perform additional work and furnish labor and materials to effect certain repairs to the said lifeboats.

13. That although claim has been made by Triple "A" Machine Shop, libelant herein, against the respondent, United States of America, for the "reasonable value" of the said work performed, in the alleged amount of $6,342.00 as set forth in libelant's Third Cause of Action, such sum has not been

paid and libelant has failed and refuses to pay said sum.

14. That in October, 1950, Triple "A" Machine Shop, libelant herein, was required to perform the aforesaid additional work on the said five lifeboats and libelant was advised by the Contracting Officer, Military Sea Transportation Service, Pacific, that such additional work was covered under the Specifications for Repairs No. MSTSP 51-64, Job Order No. 10 and Master Ship Repair Contract MST-235. That libelant proceeded with said work under written protest and notice to the Contracting Officer that libelant would require payment of the reasonable value of said additional work.

15. That in October, 1950, demand was made by Triple "A" Machine Shop, Inc., libelant herein, to Military Sea Transportation Service, Pacific, for payment of the "reasonable value of all labor and materials" furnished by the libelant and such demand was made pursuant to Article 14 of Master Ship Repair Contract MST-235.

16. That libelant, Triple "A" Machine Shop, in November, 1950, was advised by the Contracting Officer, Military Sea Transportation Service, Pacific, that the Contracting Officer has made a determination that pursuant to the terms of the Specifications for Repairs, Job Order No. 10 and Article 5(j) of the Master Ship Repair Contract No. MST-235, libelant was not entitled to additional compensation for said additional work and materials.

17. That the claim of Triple "A" Machine Shop,

libelant herein, for payment for the additional work performed on the five lifeboats was appealed to the Contract Advisory Board, Military Sea Transportation Service, by libelant under and pursuant to Article 5(j) and Article 14 of said Master Contract No. 235.

18. That the Contract Advisory Board, Military Sea Transportation Service, declined to consider said appeal under Article 14, but determined under Article 5(j) of the Master Ship Repair Contract MST-235, that the Specifications for Repair No. MSTSP 51-64 and Job Order No. 10 covered in full any and all work which libelant had been required to perform in repairing the said lifeboats, and that libelant accordingly was not entitled to reimbursement for said additional work.

Contentions of Libelant

1. That the necessity for said additional repair work was not known to libelant and could not have been discovered by libelant until after libelant's said bid had been accepted and Job Order No. 10 had been issued.

2. That if the respondent knew or had reason to believe that said additional repair work would be necessary or required, then the concealment of such fact and failure to make disclosure thereof constituted actual and constructive fraud on the part of respondent.

3. That if the Contracting Officer did not know or have reason to believe that said extra repair work would be required, then said repairs could

not have been and were not, in fact, embodied in said specifications or job order.

4. That under Article 4 of said master contract libelant was only required to perform the work specified in the job order, plans and specifications.

5. That under Article 14 of said master contract libelant was required to proceed with said additional repair work on demand of the Contracting Officer and could not hold up the job pending the settlement of the controversy relative thereto.

6. That the refusal of the Contract Advisory Board, Military Sea Transportation Service, Washington, D. C., to entertain libelant's appeal under Article 14 of said master contract leaves the controversy open for judicial determination herein.

7. That the decision of the Contract Advisory Board, Military Sea Transportation Service, Washington, D. C., under Article 5(j) of said master contract is not a final and conclusive determination, and does not bar or limit libelant's right to a judicial determination of said controversy herein.

8. That the amount claimed in libelant's third cause of action herein, to wit, $6,342.00, is the reasonable value of the said additional repair work, and that libelant is entitled to a judgment herein for said amount.

Contentions of Respondent

1. That Master Ship Repair Contract No. MST-235, provided under Article 5(j) thereof for an administrative determination by the Contracting Officer, Military Sea Transportation Service, Paci-

fic, and Commander, Military Sea Transportation Service, of all disputes arising under said Article 5(j) for repair of the five lifeboats as between the contracting parties.

2. That the Commander, Military Sea Transportation Service, pursuant to Article 5(j) of the Master Ship Repair Contract No. MST-235, determined that the alleged "additional work" was provided for within the provisions of the Specifications for Repairs MSTSP 51-64 and Job Order No. 10, and that extra pay therefore was not contemplated or provided for in the agreement to repair, above and beyond the contract price as agreed to by libelant in its bid for repairs.

3. That the decisions of the Commander, Military Sea Transportation Service, and the Contracting Officer, Military Sea Transportation Service, Pacific, were final and determinative of the dispute between the parties to the contract.

4. That the terms of Master Ship Repair Contract No. MST-235, the Specifications for Repairs MSTSP 51-64, and Job Order No. 10, govern exclusively the contractual relationship of the libelant and respondent herein.

Pre-Trial Exhibits

Libelant's:

Libelant refers to and adopts respondent's exhibits hereinafter referred to and in addition thereto lists the following, namely:

1. Letter from Military Sea Transportation Serv-

ice, Washington, D. C., to Triple "A" Machine Shop, Inc., dated October 21, 1951.

2. Letter from J. Thaddeus Cline, attorney for Triple "A" Machine Shop, Inc., to Military Sea Transportation Service, Washington, D. C., dated November 14, 1951.

Respondent's:

1. Contract No. MST-235, dated February 10, 1950, entitled:

Department of the Navy
(Military Sea Transportation Service)
Master Contract
for
Repair and Alteration of Vessels
Between
United States of America
and
Triple "A" Machine Shop, Inc.,
San Francisco, Calif.

2. Specifications for Repairs to Five Lifeboats, Specifications No. MSTSP 51-64, dated September 20, 1950.

3. Job Order No. 10, Contract No. MST-235, issued to Triple "A" Machine Shop, Inc., dated October 2, 1950.

4. Invitation to Bid, dated September 21, 1950, Invitation No. P 51-36.

5. Bid Triple "A" Machine Shop, Inc., dated September 29, 1950, for repairs to five lifeboats.

6. Cancelled check, drawn on Treasury of the United States, payable to Bank of America, Columbus Branch, assignee Triple "A" Machine Shop,

San Francisco, in the amount of $13,265.00, check No. 15,141, dated January 31, 1951.

7. Public Voucher for Public Services Other Than Personal, dated January 30, 1951, for account Triple "A" Machine Shop, Inc., in the amount of $13,265.00.

8. Letter from Triple "A" Machine Shop, to Military Sea Transportation Service, Pacific, dated January 16, 1951.

9. Letter from Military Sea Transportation Service, Pacific, to Triple "A" Machine Shop, dated January 16, 1952.

10. Letter from Captain J. K. McCue, United States Navy Contracting Officer, Military Sea Transportation Service, Pacific, to Mr. J. Thaddeus Cline, dated November 2, 1952.

11. Letter from Mr. J. Thaddeus Cline to Military Sea Transportation Service, Pacific, dated June 20. 1951,

12, Letter from Captain J. K. McCue, United States Navy Contracting Officer, to Triple "A" Machine Shop, dated October 16, 1950.

13. Letter from J. Thaddeus Cline to Military Sea Transportation Service, Pacific, dated October 20, 1950.

14. Letter to Triple "A" Machine Shop, Inc., from Commander, Military Sea Transportation Service, dated June 16, 1952.

/s/ LOUIS E. GOODMAN,
Judge, U. S. District Court.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Asst. to the Attorney General;

/s/ RICHARD J. HOGAN,
Special Attorney, Department of Justice, Proctors for Respondent.

Approved:

/s/ J. THADDEUS CLINE,
Proctor for Libelant.

[Endorsed]: Filed November 6, 1953.

RESPONDENT'S PRE-TRIAL EXHIBIT No. 13

(Copy)

J. Thaddeus Cline
Attorney at Law
Monadnock Building
San Francisco 5, California
Telephone EXbrook 2-7445

October 20, 1950.

Military Sea Transportation Service, Pacific,
33 Berry Street,
San Francisco 7, California.

Attention: Captain J. K. McCue.

Re: Job Order No. 10, Contract No. MST 235.

Dear Sirs:

This letter is addressed to your office by the undersigned, as attorney for Triple "A" Machine

Shop, Inc., and is in reply to your letter addressed to said company under date of October 16, 1950.

As you know, the contract referred to in your letter was recently completed as far as possible until certain additional work could be performed and additional materials could be installed, namely, the work and materials referred to in your said letter. This additional work has been required to replace certain items that the Coast Guard inspector determined to be defective.

It is my understanding that a contractor has no right to hold up any job pending settlement of a dispute arising out of or relating to a ship repair contract. I have so advised the contractor and the said company has been and now is proceeding with the said additional work without waiting for a field order covering the reasonable cost thereof.

Before proceeding with the said additional work, the reasonable cost of a substantial part thereof was checked over on the job by the Navy Inspector. His figures have been heretofore delivered to your office. The cost as determined by the said inspector appears to be unreasonably low, but the same will be accepted by the contractor as to the items covered. If the same or any part thereof can be shown to be too high, we will readily agree to any reasonable adjustment. Likewise, the contractor will only require payment of the reasonable value of the other items that were not included in the inspector's said statement.

You are respectfully advised, however, that the said

contractor has not and will not accept your erroneous statement, that the said additional work and materials are included in the said contract. To the contrary, the said contractor does now and will demand and require full payment of the reasonable cost of furnishing and installation of same. You are further advised that it is expected that the contract will be completed and the said additional work will be performed within the time mentioned in the contract, but you are informed that the contractor will not assume any responsibility or liability for any delay in completing the said contract that may result from the furnishing of the said additional work and installing the said additional materials.

Yours very truly,

/s/ J. THADDEUS CLINE.

JTC:jm

cc: Triple "A" Machine Shop, Inc.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF GENUINENESS OF DOCUMENTS UNDER RULE 32B, SUPREME COURT ADMIRALTY RULES

To: The Respondent above named and to Lloyd H. Burke, Keith R. Ferguson and Richard J. Hogan, Proctors for Respondent:

You, and each of you, will please take notice that the Libelant above named hereby requests said Respondent, pursuant to Rule 32B of the Supreme Court Admiralty Rules, to admit within ten (10)

days after service of this request the genuineness of the following documents:

1. Letter from J. Thaddeus Cline, as attorney for Triple "A" Machine Shop, Inc., to Department of the Navy, dated November 14, 1951, copy of which is annexed hereto, marked "Exhibit A."

2. Letter from Department of the Navy executed by W. H. von Dreele, addressed to Triple "A" Machine Shop, Inc., dated October 22, 1951, a copy of which is annexed hereto, marked "Exhibit B."

Dated: November 20, 1953.

/s/ J. THADDEUS CLINE,
Proctor for Libelant.

EXHIBIT A

(Copy)

J. Thaddeus Cline
Attorney at Law
Monadnock Building
San Francisco 5, California
Telephone EXbrook 2-7445

November 14, 1951.

Department of the Navy,
Military Sea Transportation Service,
Washington 25, D. C.

Attention: W. H. von Dreele, Captain, U.S.N.,
Director, Maintenance & Repair Division.

Subject: MST Contract #235—Job Order #10.

Your ref. MSTS-41C/bh,
Ser. 20255M4,
22 Oct., 1951.

Dear Sirs:

Your letter of October 22, 1951, addressed to Triple "A" Machine Shop, Inc., has been referred to the undersigned for reply.

The said contractor had been advised by your local office that its claim should be handled as a dispute under Article 14, of the Master Contract. It was for this reason that the appeal referred to the said section.

The suggestion contained in your said letter that the appeal might well be considered under Article 5-(j) is sincerely appreciated. It is quite possible that the last mentioned section would give your office greater latitude in considering the merits of said contractor's claim than you would have under Article 14.

Instead of electing to appeal under one article or the other, it would seem more appropriate to appeal under both of said articles. This would surely enable your office to consider the said claim from all possible angles. You are, therefore, respectfully notified that said contractor does appeal under Article 14 and also under Article 5-(j).

To assist your office in arriving at a just decision,

a few pertinent facts will be briefly commented upon.

Triple "A" Machine Shop, Inc., was the low bidder on the lifeboat job here in question. The said company submitted its bid on the specifications prepared by the Government. So far as was known to anyone or that could be ascertained from inspecting the boats, the specifications completely covered all necessary repairs.

In going ahead with their contract and in order to do the work set forth in the specifications, the tanks were removed. The Coast Guard and M.S.T.S. inspectors then came on the job and condemned certain plates and parts of the boats. Pursuant to a letter dated October 16, 1950, from the office of Deputy Commander, Military Sea Transportation Service, Pacific, Triple "A" Machine Shop, Inc., was required to do the following specified extra work. There seems to be some error in reference to the charge for the said extra work, in that your letter of October 22nd refers to the figure of $5,-392.00. The extra work done, as aforesaid, is hereinafter listed with the proper charge for each of the items, namely:

298 sq. ft. shell plate	$3,600.00
All floors in 4 lifeboats	1,000.00
Approx. 270 sq. ft, #1 lumber for margin boards	352.00
2 Hand gear propelling sockets	90.00
All galvanized iron tank straps	200.00
All aluminum tank straps	50.00
Thwarts (2 renewed)	150.00

Life lines and floats on boats	225.00
116 ft. splash railing	140.00
24 hanging clips for splash railing	70.00
24 sockets for splash railing	70.00
Renewed 2 plates and 2 doublers which specifications called for fairing and same were found cracked	395.00
Total	$6,342.00

No one can dispute the fact that the contractor could not possibly have known that the above-listed parts were defective. Likewise, the Government could not have known that the boats required any repairs other than as expressly listed in the specifications. Even the inspectors could not have determined that additional work would be required until after the tanks had been removed by the contractor.

It can not be claimed that the Government knew of the existence of these extra defects; because if such were the case, then the failure to include the same in the specifications would have amounted to a positive fraud and deception on the part of the Government.

On the other hand, if the Government did not know of these defects that were hidden by the tanks, how can it now be claimed that the contractor could or should have known of their existence.

Contracts of this kind should in every instance be fair, open, and above-board. Government prepared specifications should not be a trap for the unwary. A bid should always be a fair estimate of the

value of the labor and materials required to effect a certain specified job. A bidder on a Government job should not be required to surmise, guess or gamble as to the nature and extent of the job in question.

It is, therefore, respectfully urged that the appeal be sustained in favor of the contractor and that an order be made to pay said contractor the full reasonable value of said extra work.

Yours very truly,

J. THADDEUS CLINE.

JTC:jm

cc: Triple "A" Machine Shop, Inc.

EXHIBIT B

(Libelant's Pre-Trial Ex. No. 2)

Department of the Navy
Military Sea Transportation Service
Washington 25, D. C.

In reply refer to
MSTS-41C/bh
Ser 20255M4

22 Oct., 1951.

Triple "A" Machine Shop, Inc.,
Pier 64,
San Francisco 7, Calif.

Subj: MST Contract #235

Gentlemen:

Commander, Military Sea Transportation Service, Pacific, has forwarded to this office your claim

in the amount of $5,392.00 for additional compensation in connection with contract MST-235, job order #10. Pertinent correspondence from your representative, Mr. J. Thaddeus Cline, indicates that you desire to appeal under Article 14 of subject specifications. However, there appears to be a question regarding interpretation of specifications, which would seem to be more accurately covered by Article 5-(j).

Kindly advise whether you desire to appeal these matters under Article 5(j) of subject specification, and whether you wish to submit further evidence to substantiate your claim.

Yours very truly,

W. H. von DREELE,

Captain, U. S. N., Director Maintenance & Repair Division.

Copy to: COMSTSPAC.

[Endorsed]: Filed November 20, 1953.

[Title of District Court and Cause.]

ADMISSION OF GENUINENESS OF DOCUMENTS

Whereas, the libelant above named has made and filed its request herein for respondent's admission of genuineness of documents pursuant to Rule 32-B of Supreme Court Admiraly Rules, and

Whereas, respondent has inspected the copies of said documents attached to the said request and finds that the same appear to be in all respects true and correct;

Now, Therefore, the respondent above named does hereby admit the genuineness of the said documents recited in the said request.

Dated. November 20, 1953.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General;

/s/ RICHARD J. HOGAN,
Special Attorney, Department of Justice, Proctors for Respondent.

[Endorsed]: Filed November 20, 1953.

[Title of District Court and Cause.]

ORDER RESERVING RULING ON MOTION TO DISMISS

Libelant seeks to recover $6,342.00, alleged to be owing for work done under a contract to repair and alter vessels of the United States. The United States has moved to dismiss the libel upon the ground that libelant's claim was by the terms of the contract subject to administrative determination by officers of the United States whose decision was binding and conclusive upon the parties.

The contract contains two provisions for the administrative determination of disputes—Articles 5(j) and 14. Article 14 is the general "disputes" provision of the contract and sets forth the procedure for the determination of "any disputes concerning a question of fact or price" arising under the contract or any job order or plan or specifications other than the matters to be determined under Article 5(j). Article 5(j) prescribes the means for settlement of "any questions regarding or arising out of the interpretation of plans or specifications" or "any inconsistency between plans and specifications."

Article 14 provides a three-stage procedure—initial determination by the contracting officer, referral to the Commander, Military Sea Transportation Service, and appeal to the Secretary of the Navy. The decision of the Secretary is made final

and conclusive, and in the event no appeal is taken to the Secretary, the decision of the Commander, M.S.T.S. is final and conclusive. Article 5(j) prescribes a two-stage procedure—initial determination by the contracting officer and appeal to the Commanders, M.S.T.S., or his representative. But, Article 5(j) does not specify that the Commander's decision shall be final and conclusive.

When libelant asserted the claim upon which it now seeks recovery, it was disapproved by the contracting officer. Libelant thereupon referred it to the Commander, M.S.T.S., with the statement that the claim was referred under the provisions of Article 14. Libelant was notified that the matters in dispute were of a class determinable under Article 5(j) rather than Article 14. Libelant then advised the Commander, M.S.T.S., that the appeal was taken under both Articles to assure that the claim received proper consideration.

The Commander, M.S.T.S., designated the Contract Advisory Board as his representative to hear the appeal. The Board declined to hear the appeal under the provisions of Article 14, but considered and denied Libelant's claim under the provisions of Article 5(j). Libelant apparently did not press for determination of its claim pursuant to Article 14, for no attempt was made to appeal to the Secretary of the Navy from the adverse decision of the Board.

The United States now contends, upon its motion to dismiss, that the decision of the Board was final

and conclusive. Libelant urges in opposition to the motion that an administrative determination made pursuant to Article 5(j) is not by the terms of the contract final and conclusive.

There is no occasion for the court to decide whether determinations made pursuant to the procedure prescribed in Article 5(j) were intended by the parties to be final, unless the matters here in dispute were of the class required to be determined under Article 5(j). It cannot be clearly ascertained from the pleadings, exhibits, and the agreed statement of facts whether the matters in dispute were of the class to be determined under Article 5(j) or under Article 14 or in some other manner. Only the evidence at the trial will clarify this issue. Consequently, ruling on the motion to dismiss is reserved until the trial. Rule 12(d) F.R.C.P.

Dated: December 11, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed December 11, 1953.

[Title of District Court and Cause.]

STIPULATION RE VALUE OF MATERIALS AND LABOR

It is Hereby Stipulated as follows:

That the libelant performed certain work and furnised certain materials in the repair of the life-

boats referred to in the third cause of action in the libel and libelant contends that such work so performed and materials furnished were extra work not provided for in that certain contract awarded to libelant as the lowest bidder which contention respondent denies. The respondent United States of America contends that such work and materials were performed and furnished, as demanded by respondent, pursuant to and as provided for by the terms of said contract so awarded to libelant as the lowest bidder for such work and necessary for the completion of the repair of said lifeboats and not as extra work or extra materials as contended by libelant. The work performed and materials furnished are as follows:

298 sq. ft. shell plate.
All floors in 4 lifeboats.
Approx. 270 sq. ft. #1 lumber for margin boards.
2 Hand gear propelling sockets.
All galvanized iron tank straps.
All aluminum tank straps.
Thwarts (2 renewed).
Life lines and floats on boats.
116 ft. splash railing.
24 hanging clips for splash railing.
24 sockets for splash railing.
Renewed 2 plates and 2 doublers which specifications called for fairing and same were found cracked.

It is Further Stipulated that the value of the said

labor and materials is the sum of Six Thousand Forty Dollars ($6,040.00).

Dated: December 16th, 1953.

/s/ LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General;

/s/ RICHARD J. HOGAN,
Special Attorney Department of Justice, Proctors for Respondent.

/s/ J. THADDEUS CLINE,
Proctor for Libelant.

[Endorsed]: Filed December 24, 1953.

[Title of District Court and Cause.]

ORDER FOR ENTRY OF JUDGMENT

It is Ordered that there be entered herein upon findings of fact and conclusions of law, judgment in favor of the defendant United States of America and that the respective parties pay their own costs.

Dated: February 24th, 1954.

/s/ MICHAEL J. ROCHE,
Chief United States District Judge.

[Endorsed]: Filed February 24, 1954.

In the Southern Division of the United States District Court, Northern District of California

In Adminalty—No. 26198

TRIPLE "A" MACHINE SHOP, INC., a Corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

FINAL DECREE

This cause having come on to be heard by the above-entitled Court on the 16th and 17th of December, 1953, the libelant appearing by its proctor, J. Thaddeus Cline, Esq., and respondents by its proctors, Lloyd H. Burke, Esq., United States Attorney; Keith R. Ferguson, Esq., Special Assistant to the Attorney General, and Richard J. Hogan, Esq., Special Attorney, Department of Justice, and the Court having considered the evidence, both oral and documentary, and the arguments of counsel and the cause having been submitted upon the briefs of the parties on file herein, and the Court, after due deliberation, having filed herein its Order for Entry of Judgment in favor of the respondent and the Court having made and entered its Findings of Fact and Conclusions of Law, it is therefore

Order, Adjudged and Decreed that the above-

entitled cause be and the same is hereby dismissed, each party to bear its own costs.

Dated: March 10, 1954.

/s/ MICHAEL J. ROCHE,
Chief United States District Judge.

Lodged March 9, 1954.

[Endorsed]: Filed March 10, 1954.

Entered March 11, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action coming on regularly for trial before this Court on the 16th and 17th of December, 1953, the respondent United States of America, appearing by its proctors, Lloyd H. Burke, United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General, and Richard J. Hogan, Special Attorney, United States Department of Justice, and libelant appearing by its proctor J. Thaddeus Cline, pre-trial hearing having been had, all parties declared themselves ready for trial, whereupon evidence, both oral and documentary, was submitted to the Court on behalf of libelant and respondent and upon conclusion of all the evidence and after oral argument and submission of

briefs by respective counsel, the cause was duly submitted. After due deliberation of all the evidence and of the law relative thereto, the Court being duly advised in the premises now makes the following:

Findings of Fact

I.

Libelant Triple "A" Machine Shop, Inc., at all of the material times referred to herein was and still is a corporation, organized and existing under the laws of the State of California and was and still is engaged in the business of constructing and repairing sea-going ships and boats.

II.

Respondent United States of America was at all of the material times referred to herein the owner of five (5) lifeboats, one (1) lifeboat gas driven of 20′0″ in length, beam 9′0″, of a capacity of 43 persons; four (4) lifeboats, hand-propelled, length 30.66 feet, beam 10.16 feet and with a capacity of 77 persons.

III.

That on February 10, 1950, the respondent through its agency Military Sea Transportation Service, Pacific, and the libelant entered into a "Master Contract" for repair and alteration of vessels, Contract MST-235, which provided by Article 5(j) thereof, as regards any work to be performed by libelant for respondent, pursuant to any

specifications issued for repairs to any of the respondent's vessels:

> "The Government does not guarantee the correctness of dimensions, sizes and shapes set forth in any job order, sketches, drawings, plans or specifications prepared or furnished by the Government * * *. Any questions regarding or arising out of the interpretation of plans or specifications hereunder or any inconsistency between plans and specifications shall be determined by the Contracting Officer subject to appeal by the Contractor to Commander, Military Sea Transportation Service, or his duly authorized representative who shall not be the Contracting Officer. Pending final decision with respect to any such appeal, the Contractor shall proceed diligently with the performance of the work, as determined by the Contracting Officer."

IV.

That the respondent on September 21, 1950, by Invitation No. P 51-36 solicited from various ship repair and construction corporations in the San Francisco and Oakland, California, area, bids to perform work involving repairs to five (5) lifeboats; that accompanying the Invitation to Bid was Specification No. MSTSP 51-64 which set forth the work to be accomplished on the five (5) lifeboats. The Invitation to Bid advised bidders as to the location of the lifeboats, their availability for inspection and that Specifications for Repair No. MSTSP

51-64 accompanying the Invitation to Bid, upon the issuance of a Job Order by the respondent, would become a part of the Invitation to Bid.

V.

That Specification No. MSTSP 51-64 accompanying the Invitation to Bid No. P-51-36 provided:

"It is the intent of these specifications to provide for the complete repair and reconditioning, both mechanically and structurally, of five (5) lifeboats, all as necessary to place the boats in first class operating condition and ready for use.

"The work shall include, but shall not be limited to, any detailed specifications which follow:

"The contractor shall furnish all labor, materials, transportation and all other equipment necessary to completely repair four (4) #13 and # 14 gauge galvanized steel hulls and one (1) aluminum hull lifeboats now located in Rows Numbers 1 and 4 open storage space adjacent to Warehouse 3, Oakland Army Base. On award of the contract, the contractor shall immediately remove all five (5) lifeboats from Oakland Army Base to his plant for the accomplishment of the repairs. The Government will supply loading facilities.

"All work shall be subject to inspection and approval by the U. S. Coast Guard and the U. S. Navy Inspector assigned.

"The interior of each of the five (5) lifeboats shall be completely stripped of all equipment."

Further provision was made as follows:

"Replacements of deteriorated tanks shall be accomplished only on a written field order."

VI.

That libelant, through its authorized agent, libelant's Vice-President and General Manager, made a thorough inspection of the five (5) lifeboats as to their condition and need for repairs; that all items requiring repair were visible and open to inspection by the libelant's agent and said agent made such notes relative to repairs to be accomplished as he deemed necessary.

VII.

That on September 29, 1950, the libelant in response to Invitation to Bid No. P 51-36 did "subject to all the terms and conditions of the bid schedule and instruction relating thereto" offer and agree by its bid submitted to respondent over the signature of libelant's President to completely repair and recondition, both mechanically and structurally, the five (5) lifeboats specified in the Invitation to Bid No. P 51-36 and Specification No. MSTSP 51-64 at a total price of $3,775.00 and said bid was submitted on a basis of computations as to work needed to be done and the cost thereof made by libelant's own marine surveyor and Vice-President and General Manager.

VIII.

That on the 2nd of October, 1950, Job Order No. 10 was issued by the respondent through its agency, Military Sea Transportation Service, Pacific, in accordance with Article 3 and Article 4 of Master Ship Repair Contract No. MST-235; that by such Job Order the libelant was directed to furnish the supplies and service required to perform the work described in Specification No. MSTSP 51-64 entitled "Repairs to Five (5) Lifeboats," and said Job Order No. 10 set forth therein the agreed total price of $3,775.00 submitted by libelant for the repairs.

IX.

That the libelant entered upon performance of the work pursuant to Master Contract MST-235, Specifications for Repairs No. MSTSP 51-64 and Job Order No. 10; that on the 27th of November, 1950, Change Order "A" to Job Order No. 10 issued from the respondent through its agency, Military Sea Transportation Service, Pacific, providing for "Addition No. 1 to Specifications for Repairs MSTSP 51-64," increasing the job order price and authorizing payment to libelant of the sum of $9,490.00 for replacement of air and provision tanks in four (4) lifeboats; that Change Order "A" to Job Order No. 10 was issued by respondent in conformance with the provision in Specification No. MSTSP 51-64 providing as follows:

> "Replacements of deteriorated tanks shall be accomplished only on a written field order."

X.

That prior to completion of the repairs to the five (5) lifeboats, inspection was made thereof by the United States Coast Guard and an Inspector, an employee of Military Sea Transportation Service, Pacific, pursuant to Specifications for Repairs No. MSTSP 51-64, at which time it was determined by the inspectors that certain repairs were required in order to insure compliance with Federal statutory requirements as to seaworthiness.

XI.

That the repairs which were found to be necessary by reason of the inspection made by the Coast Guard Inspector and Inspector for Military Sea Transportation Service, Pacific, did not comprise extra work to be performed by the libelant, but were only such repairs and work required to be accomplished and performed in order to conform with the terms and conditions of the Specifications for Repairs MSTSP 51-64; that all such items of repair were visible and subject to inspection and ascertainment by libelant's representative prior to submission of libelant's bid; that the value of the labor and materials furnished by the contractor for such work and materials was in the amount of $6,040.00.

XII.

That the libelant on or about the 16th of October, 1950, was directed to furnish materials and accomplish the repairs necessary to effect complete repairs and reconditioning of the five (5) lifeboats as pre-

scribed in Specification No. MSTSP 51-64; that on or about the 16th of October, 1950, libelant advised Military Sea Transportation Service, Pacific, that it expected additional compensation for the work; that on the 16th of October, 1950, libelant was informed formally in writing by Military Sea Transportation Service, Pacific, through its Contracting Officer, as provided for under Article 5 (j), Master Contract MST-235, that the labor and materials for which extra compensation was requested was considered to be covered fully under Specification No. MSTSP 51-64 and that no additional compensation for the work and materials would be paid.

XIII.

That in November, 1950, the Contracting Officer, Military Sea Transportation Service Pacific, again made a formal written determination, communicated to libelant, under the provisions of Article 5(j) of Master Contract MST-235 that the Specifications for Repairs MSTSP 51-64 and Job Order No. 10 required libelant to do all work necessary to completely repair and recondition the boats and that work and materials furnished by the libelant were not "extra," were not outside the terms, scope and provisions contemplated by the contract, and therefore, no additional payments would be made for the work in question.

XIV.

That the libelant herein appealed the decision of the Contracting Officer, Military Sea Transportation Service, Pacific, to the Contract Advisory

Board, Military Sea Transportation Service, Washington, D. C., and that such appeal was made by the libelant pursuant to both Article 5(j) and Article 14, of Master Contract MST-235.

XV.

That the Contract Advisory Board, Military Sea Transportation Service, Washington, D. C., determined that the dispute between libelant and respondent concerned a question regarding or arising out of the interpretation of plans and specifications under Article 5(j) of the Master Contract MST-235; that the Specifications for Repair No. MSTSP 51-64 and Job Order No. 10 provided for and covered in full all work which libelant had been required to perform in completely repairing the five (5) lifeboats and that libelant accordingly was not entitled to reimbursement for said additional work.

XVI.

That the libelant herein has been paid by respondent United States of America the sum of $3,775.00 alleged by libelant to be due and owing as set forth by libelant in Article V of libelant's first cause of claim in the libel filed herein for labor and materials furnished under the repair contract.

XVII.

That libelant herein has been paid by respondent United States of America the sum of $9,940.00 alleged by libelant to be due and owing as set forth

by libelant in Articles I and III of libelant's second cause of claim in the libel filed herein for labor and materials furnished under the repair contract.

Conclusions of Law

I.

That the labor performed and material supplied by the libelant in the value of $6,040.00 were contemplated by and provided for in the Specifications for Repairs MSTSP 51-64 and Job Order No. 10 and libelant is not entitled to extra pay therefor above and beyond the contract price as agreed to and submitted by libelant in its bid for repairs.

II.

That the terms and provisions of Master Contract MST-235, Specifications for Repair MSTSP 51-64, Job Order No. 10 and libelant's bid for repairs submitted on September 29, 1950, govern exclusively the contractual relationship between libelant and respondent; that the Contracting Officer, Commander, Military Sea Transportation Service, acting pursuant to Article 5(j) of Master Contract MST-235, having determined that the alleged "extra work" for which libelant sought recovery, was provided for and contemplated by the provisions of the Specifications for Repair MSTSP 51-64, Job Order No. 10 and libelant's bid for repairs, dated September 29, 1950, and that extra pay therefor was not contemplated or provided for in the agreement to repair, above and beyond the con-

tract price as agreed to by libelant in its bid for repairs and that such determination by the Contracting Officer acting under the authority of Article 5(j) of Master Contract MST-235 was final and conclusive as to libelant and respondent.

III.

That the decision of the Contracting Officer, Military Sea Transportation Service, Pacific, made pursuant to Article 5(j) of Master Contract MST-235 constituted a final and conclusive determination of the dispute as between the contracting parties and therefore cannot be set aside by this Court.

IV.

That libelant has failed to prove a cause of action against the respondent United States and is not entitled to recover from respondent under the libel on file herein.

It Is Therefore Ordered that a decree be entered in favor of the respondent United States of America and that the libel herein be dismissed without costs.

Dated: March 10, 1954.

/s/ MICHAEL J. ROCHE,
Chief United States
District Judge.

Lodged March 1, 1954.

[Endorsed]: Filed March 10, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION TO AMEND FINDINGS OF FACT, PURSUANT TO RULE 52(b)

To: The Respondent above named, and

To: Lloyd H. Burke, United States Attorney; Keith R. Ferguson, Special Assistant Attorney General; Richard J. Hogan, Special Attorney, Department of Justice.

You, and each of you, will please take notice that on the 30th day of March, 1954, at the hour of 9:30 o'clock a.m., or as soon thereafter as counsel can be heard, the libelant above named will move the above-entitled Court, Department of Chief United States District Judge Michael J. Roche thereof, for an order amending the Findings of Fact and Conclusions of Law herein so as to make the same conform to the agreed facts as contained in the Pre-Trial Order herein and the evidence introduced at the trial and the law applicable to this case.

That said motion will be based on this notice of motion and will be made on the ground that the Findings of Fact and Conclusions of Law as prepared by the respondent above named and signed by the Court above named do not conform to the evidence or the law applicable to this case.

Dated: March 19, 1954.

/s/ J. THADDEUS CLINE,
Proctor for Libelant.

[Endorsed]: Filed March 19, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL PURSUANT TO RULE 59

To: The Respondent above named, and

To: Lloyd H. Burke, United States Attorney; Keith R. Ferguson, Special Assistant Attorney General; Richard J. Hogan, Special Attorney, Department of Justice.

You, and each of you, will please take notice that on the 30th day of March, 1954, at the hour of 9:30 o'clock a.m., or as soon thereafter as counsel can be heard, the libelant above named will move the above-entitled Court, Department of Chief United States District Judge Michael J. Roche thereof, for an order granting a new trial herein.

That said motion will be based upon this notice of motion and will be made on the following grounds:

1. Insufficiency of the evidence to justify the decision herein.

2. That the decision is contrary to law.

3. Errors of law, occurring at the trial and excepted to by libelant.

Dated: March 19, 1954.

/s/ J. THADDEUS CLINE,
Proctor for Libelant.

[Endorsed]: Filed March 19, 1954.

[Title of District Court and Cause.]

MOTION TO MODIFY DECREE

Comes now the United States of America, respondent above named, and moves the Court to modify its Decree entered herein on March 10, 1954, and for grounds of said Motion, alleges:

1. That the said Decree inadvertently provides in lines 27 and 28 thereof:

> "Ordered, Adjudged and Decreed that the above-entitled cause be and the same is hereby dismissed, each party to bear its own costs."

whereas said Decree should properly provide as follows:

> "Ordered, Adjudged and Decreed that judgment be entered herein in favor of the respondent, United States of America, and that the respective parties hereto pay their own costs."

2. That the Decree entered herein on March 10, 1954, was inadvertently entered in that it did not enter judgment as provided for in the Order for Entry of Judgment entered and filed on February 24, 1954.

Said Motion will be based upon all of the orders, pleadings and files in the above-entitled cause.

Dated: March 30, 1954.

LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ RICHARD J. HOGAN,

Special Attorney, Department of Justice, Proctors for Respondent United States of America.

NOTICE OF HEARING OF MOTION

To: Triple "A" Machine Shop, Inc., libelant above named, and J. Thaddeus Cline, its proctor herein:

You, and each of you, will please take notice that respondent above named will call up for hearing the within Motion before this Court on Monday, April 5, 1954, at the hour of 10:00 a.m., or as soon thereafter as counsel may be heard in the Courtroom of the above-entitled Court, Post Office Building, Seventh and Mission Streets, San Francisco, California.

Dated: March 30, 1954.

LLOYD H. BURKE,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ RICHARD J. HOGAN,

Special Attorney, Department of Justice, Proctors for Respondent United States Attorney.

[Endorsed]: Filed March 31, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTIONS FOR NEW TRIAL AND TO AMEND FINDINGS

The motions of plaintiff for a new trial and to amend findings of fact, having been heard and submitted, and the Court being fully advised in the premises;

It Is Hereby Ordered that the said motions be, and the same are, hereby Denied.

Dated: April 15, 1954.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed April 15, 1954.

[Title of District Court and Cause.]

MODIFIED FINAL DECREE

This matter coming on for hearing before the undersigned Judge of the above-entitled Court upon the Motion of the respondent herein for the entry of a Modified Final Decree to conform to the Order for Entry of Judgment made and entered in this cause on February 24, 1954, and the libelant appearing by its proctor, J. Thaddeus Cline, Esq., and respondent appearing herein by its proctors, Lloyd H. Burke, Esq., United States Attorney; Keith R. Ferguson, Esq., Special Assistant to the Attorney General, and Richard J. Hogan, Esq., Special Attorney,

Department of Justice, and the matter being fully heard on the arguments of counsel for the libelant and respondent herein and the Court being fully advised in the premises, it is

Ordered, Adjudged and Decree that the Motion to modify the said Final Decree made and entered herein by the above-entitled Court on March 10, 1954, be and the same is hereby granted and said Final Decree is hereby modified to conform to the Order of this Court for Entry of Judgment entered herein February 24, 1954, and in accordance therewith it is

Further Ordered, Adjudged and Decreed that judgment be entered herein in favor of the respondent United States of America and that the respective parties hereto pay their own costs.

Done in Open Court this 5th day of April, 1954.

/s/ MICHAEL J. ROCHE,
Chief United States District Judge.

Lodged April 5, 1954.

[Endorsed]: Filed April 15, 1954.

Entered April 16, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Court Above Named:

Notice Is Hereby Given that Triple "A" Machine Shop, Inc., Libelant above named, hereby appeals to the United States Court of Appeals, Ninth Circuit thereof, from the judgments, decrees and orders made and filed in the above-entitled action, as follows:

1. Order for Entry of Judgment made and filed on February 24, 1954.

2. Final Decree, dated March 10, 1954, as modified by Modified Final Decree, dated April 5, 1954, and filed April 15, 1954.

3. Order denying libelant's motion to amend Findings of Fact.

4. Order denying libelant's Motion for New Trial.

Dated: May 7, 1954.

/s/ J. THADDEUS CLINE,
Proctor for Libelant and
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS APPELLANT INTENDS TO RELY UPON ON APPEAL

In its appeal Libelant and Appellant above named intends to rely upon the following points and specifications of error on the part of the Court above named, to wit:

1. That the Findings of Fact and Conclusions of Law herein;

(a) Omit material facts established by the Pre-Trial Order and the evidence introduced at the trial.

(b) Are materially at variance with the facts as established by the Pre-Trial Order and evidence.

(c) Contain conclusions of law under the designation of "facts."

(d) That the conclusions of law as set forth in the Findings and in the Court's "Conclusions of Law" are contrary to law.

(e) That the Conclusions of Law are at variance with the Court's Order for Entry of Judgment made and entered on the 24th day of March, 1954, and the "Final Decree" made and entered on March 10, 1954, and as modified by the Court by Order of April 5, 1954.

2. That the Court was in error in refusing to grant Libelant's Motion to Amend the Findings of Fact and Conclusions of Law.

3. That the Court was in error in refusing to grant Libelant's motion for new trial.

4. That the Court was in error in ruling that the Libelant's bid did not establish the amount of repairs it was required to make at the price specified in said bid.

5. That the Court was in error in ruling that Libelant was not entitled to compensation for making repairs that were not listed or specified in Libelant's bid.

6. That the Order for Entry of Judgment and the "Final Decree" as made and as modified are contrary to law.

7. That the Court was in error in ruling that the decision of the Contracting Officer and the Contract Advisory Board, as an administrative appeal agency, was final and conclusive as to Libelant's claim and libel herein.

Dated: May 7th, 1954.

/s/ J. THADDEUS CLINE,
Proctor for Libelant and
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 7, 1954.

The United States District Court, Northern District of California, Southern Division

No. 26198

Before: Hon. Michael J. Roche, Judge.

TRIPLE "A" MACHINE SHOP, INC.,

Libelant,

vs.

UNITED STATES OF AMERICA, et al.,

Respondent.

REPORTER'S TRANSCRIPT

Wednesday, December 16, 1953

Appearances

For Libelant:

J. THADDEUS CLINE, ESQ.

For Respondent:

RICHARD J. HOGAN, ESQ.

Opening Statements

The Clerk: Triple A Machine Shop, Inc., versus United States for trial.

Mr. Cline: Ready.

Mr. Hogan: Ready, your Honor.

The Clerk: Counsel, please state your appearance for the record.

Mr. Cline: J. Thaddeus Cline, C-l-i-n-e, attorney for the libelant.

Mr. Hogan: Richard J. Hogan, attorney for the respondent, United States.

Mr. Cline: I ask the indulgence of the Court to allow us to make a brief opening statement to acquaint the Court with what our theory is in general in this matter and with the procedure, I believe, that is agreeable and has been agreed upon by Mr. Hogan and myself. Is that agreeable to the Court?

The Court: Certainly.

Mr. Cline: All right. The issue here, we believe, or I believe, will be largely one of law rather than facts, particularly since so many facts have been agreed upon between counsel as set forth in a pretrial order.

This action is, as indicated, by Triple A Machine Shop against the United States for certain ship repair, that is, lifeboat repair. The Triple A Machine Shop is a firm here in [2*] San Francisco engaged almost exclusively in ship and boat repair, doing work primarily for the various government agencies. The work here in question, this type of work, doing ship repair for the Navy and its agencies, the Military Sea Transportation Service and so on, is in the first instance handled under what is termed a Master Contract Number 235. This particular contract is an exhibit attached to the respondent's answer in the case. It is before the Court.

After the contract or proposed contractor or fitter has entered into this contract, the Master Contract 235, he is then eligible, with other qualifications, of

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

course, to engage in government business or bid for and enter into business as a contractor to do certain ship repair work.

Now, here is the agreed statement of facts, this is what the agreed statement of facts or the pre-trial order establishes. The libelant here, Triple A Machine Shop, entered into this master contract in the Fall of 1950; I don't remember the exact date, and for this purpose it isn't important, except, I believe, in September of 1950 the respondent, through the Military Sea Transportation Service, or as it is more easily referred to, the MSTS, published an invitation or gave out an invitation to bid on the repair of five lifeboats. The specifications were prepared by the respondent, the invitation to bid was prepared by the respondent and the form which was to be used by the prospective bidders was prepared by the respondent, [3] Government.

The libelant here, based upon the Master Contract 235 and other specifications—there were no plans—the specifications and this invitation to bid, did check in and inspect the boats and did enter a bid, which also is made a part, these facts are stated and are facts in the case by reason of the pre-trial order here and agreed statement of facts between counsel, and this particular bid is also made an exhibit and is referred to in this pre-trial order, the bid of three thousand—I believe it is $3,775, I believe.

Now the specifications set forth under what they designate in accordance with the general practice in ship repair work, under schedule or category A, the specifications list certain definite work to be done on

each of the several five lifeboats. One lifeboat, for instance, is, as it is shown here—it has only engine repair listed. Others have certain plates to be replaced and others have certain dents to be taken out and so on. But the specifications in the preamble contain a generalized statement to the effect that the contractor will have to do anything else that may be necessary to put the boats in first class condition. That is, as I say, in the opening preamble of the invitation. And then later in the category A, and this is all very material to our theory, and I think the Court should be aware of what our theory is probably at the outset, rather than trying to reconstruct it at the conclusion of the hearing; [4] and under category A, these various items are listed, and on which the libelant bid, and was low bidder and successful bidder.

Then as the work progressed, there were certain plates or tanks, these lifeboats had tanks and it was determined after the work had started that certain tanks had to be replaced or repaired, and this particular work was covered by what is termed a field order, an additional order directing the work to be done and fixing an additional price of around $9,400 for this tank work. And then, in addition to that, during the course of the construction and after these tanks had been taken out and the floor boards had been taken out, the inspector determined that certain considerable other work that was not theretofore apparent had to be done.

Now under the master contract that I have referred to, the contractor has no alternative. During the course of construction work if he is required—and the contractor cannot stop the job and quarrel about whether this work is going to be done or not, or whether he is going to be paid or not. Under the master contract he must proceed with the work and leave the controversy until afterwards. So that here—and the pre-trial order will show, that the libelant was called upon to do this certain other additional work, requiring the putting in of a good many hull plates, putting in a lot of thwarts and flooring and so on. And that they sought, as is shown by the pre-trial order, they sought to determine in advance that this extra work [5] would be paid for. They were given notice, as is also shown by the pre-trial order, the MSTS gave them notice they would have to proceed with the work and claimed that it came within the specifications, and there would be no payment for it. That is, any extra payment. And it is also shown and agreed by the pre-trial order that the libelant proceeded with the work under written protest and under notice that this work was outside of the specifications on the contract and that reasonable compensation would be required for this extra work.

Now the work was done and the lifeboats were accepted and a demand was made upon the Government for the payment of this extra work. The claim was rejected by the local office of the MSTS, the contracting officer, and then in accordance with the provisions of the master contract, a notice of appeal

was given and the matter was taken up on appeal in Washington before the Contract Advisory Board.

This board, the appeals were regularly taken and we make no question of it, we assume they were duly placed before the Contract Advisory Board for determination, and this Contract Advisory Board is an agency of the same contracting officer, the Military Sea Transportation Service, but it was set up in Washington to hear controversies of this kind. And then word was received back by libelant, their appeal was filed under Article 14 of the Master Contract, which sets up that in case of a controversy between the contracting officer of the Government [6] and the contractor, locally, in case of disputes, why, the dispute may be referred to Washington for hearing and determination. And this was sent there under Rule 14, which provides that in cases of this kind that their determination is final and conclusive.

The board wrote back, as is also—it is here, the letters are here before the Court, stating that in their determination the matter did not come under Article 14, but under Article 5(j) and desired the contractor to proceed with his appeal under Article 5(j).

Now as is shown by the exhibits here in Court, the libelant responded, accepting the Government's suggestion of Article 5(j), and continuing the appeal under both sections, under Article 14 and under 5(j). And as the letter before the Court shows, the board back there, that they would then have full latitude to consider the thing and make determination. And the board did consider it and did deter-

mine and made its determination, which is before the Court, under 5(j).

The Court: Jointly or severally?

Mr. Cline: A joint letter, a notice that they had reached their decision, and so far as we know it was a unanimous decision.

The Court: On the 14 and 5(j)?

Mr. Cline: No, under 5(j) only.

The Court: What became of the 14? [7]

Mr. Cline: The exhibit, as is shown here, shows, and it is agreed in the statement of facts between counsel in the pre-trial order, there's no question about it, they declined to accept the appeal under 14. They said that was not right, that it didn't come under 14, it came under 5(j).

The Court: And the hearing——

Mr. Cline: And the hearing was had under 5(j), and they made their determination under 5(j), and their determination was that the claim that we are now talking about was not compensable. They claimed that, they determined apparently that it came within the specifications, and the contractor was bound to have done this work under his general contract.

The Court: Was their determination final?

Mr. Cline: No, your Honor. Now that—now there was in answer to that question, as the file will show, shortly here, within the last two or three weeks or thereabouts, three or four weeks, the respondent made a motion in this Court, initially before his Honor Judge Goodman, for a motion to dismiss on the ground that Article 14 by its very lan-

guage stated that the determination on an appeal was final and conclusive, it having, as the Government in its motion contended—this matter having been passed upon as, the libelant was bound by the decision and it was final and conclusive and we had no standing in Court.

The respondent filed a memorandum in opposition, the matter was briefly discussed before his Honor Judge Goodman, taken [8] under submission, and we point out to the Court that the motion is without foundation in—I beg your pardon.

The Court: Pardon me. Did he act on the order?

Mr. Cline: No, your Honor. It was expressly reserved.

The Court: I see.

Mr. Cline: By written order in the file, expressly reserved under Rule 12(d).

The motion, as we point out, is without foundation and substance, in that it is based upon a complete false premise. They rely upon Section, Article 14 of the Master Contract, and—as the basis of their order and their own evidence in Court here in connection with the pre-trial order clearly establishes, and it is admitted in the admitted facts and the accepted facts in the pre-trial order, that the decision was—that the board declined to accept the appeal under 14, that the appeal was accepted and heard only on Article 5(j), and Article 5(j)—and in Judge Goodman's opinion there is no question about it, Article 5(j) has no such provision that the determination of the administrative board shall be final or conclusive. So that we—nor is there any provision

for any further administrative procedure. In other words, as the record will show, we have exhausted all of our administrative procedural rights. There is nothing further we can do. So we come before the Court now in this action and our theory is simply this. The bid, the specifications list category A of certain specified [9] work. The bid, which is in evidence and was introduced in evidence or bound in connection with the pre-trial order by the Government, will clearly show and the evidence will show, and there is no dispute about it, it is a form of bid that is prepared by the Government. The bid itself expressly and on its face is for Category A, nothing else. That the work, that the bid was $3,750. Now within the last twelve hours we have been able to remove another matter that might take the time of the Court, and counsel, and that is, there's a question of the charge. The pre-trial order clearly establishes that the work we are talking about was required by the Government to have been done. I don't mean —they don't acknowledge that it wasn't done, come within our, plans and specifications. They claim it came within the plans and specifications and we claim it didn't. But there is no question but what the what the work had to be done. There is a question of the reasonable amount of it. Our offer was $6,340. We claimed that was fair and reasonable for this extra work that we were required to do during the course of this job.

Now that's something we would, an issue we would have had to have proved here by witnesses, and

we did have expert witnesses available yesterday, but it was agreed late yesterday afternoon between Mr. Hogan and myself, that, we agreed on both sides on a figure of $6,040. In other words, reducing our claim, I think it is $300 or something or other, which obviates the necessity of bringing in any evidence on the question of what work was [10] done or the reasonableness of the charge, so that we get down now to simply a question of whether or not this particular work that we are talking about is or is not part of the contractual obligation of the libelant.

While we are on the subject, I would like to, it is probably very trivial because it is so obviously a typographical error, it's on page 3 of the pre-trial order. There I would like to correct or have corrected on the face, I have spoken to Mr. Hogan about it, it's on the—it would be about five, six lines from the bottom. It is the last, next to the last line of the last, next to the last paragraph, the word "libelant" should be changed to "respondent."

The Court: Page?

Mr. Cline: Page 3 of the pre-trial order.

The Court: Signed by Judge Goodman?

Mr. Cline: Yes, it was signed by Judge Goodman. Yes, it was signed and approved by both counsel and signed by Judge Goodman.

The Court: What is the language?

Mr. Cline: Well, in the last line, it's on line 25 I believe, it's the word "libelant" should be changed to "respondent." It reads, "Such sum has not been

paid and libelant has failed and refused to pay the same." That should read, "and respondent has failed and refused to pay the same."

The Court: No objection? [11]

Mr. Hogan: No objection, your Honor.

The Court: Let it be amended on its face.

Mr. Cline: And then as to—it has also, I believe, been sort of informally agreed between Mr. Hogan and myself as to a procedure to be followed here, to expedite the trial, probably add to the clarity of it, to have the documents that are referred to in the pre-trial order introduced into evidence in the same number that they bear in the pre-trial order. They are listed severally from number 1 to 14, and then adding to that is number—I presume being——

The Court: Page 7?

Mr. Cline: That would be page 7 and 8, your Honor. And then adding to that, I suppose it would be his number 15 and 16, the two letters that are referred to in libelant's request for admission of documents that was filed in this matter on or about November 20, '53, there being a letter from the Navy Department, Military Sea Transportation Service, dated October 21, 1951, addressed to the libelant and a response to the said letter from myself as attorney for libelant dated November 14, 1951. Is that agreeable, Mr. Hogan?

Mr. Hogan: That is agreeable.

Mr. Cline: So then if they could be considered in evidence and bearing the exhibit numbers in the pre-trial order, and these other two, being numbered 15 and 16.

Now there is only one other matter that I think

should be [12] called to the Court's attention just by way of clarity. The libel here is in three causes of action. We are proceeding to trial only on the third cause of action, and that is the only thing that I have been discussing with the Court this morning. The first cause of action I don't even now recall, but the items in there, there's no question about it, they have been paid. We are discussing here, we are just proceeding on the third cause of action for this extra work in the amount that we have now agreed upon as being $6,040.

The Court: I will hear from Mr. Hogan.

Mr. Hogan: If your Honor please, my statement will be brief. I think that Mr. Cline's statement has been essentially fair. Respondent's position in this case is simply that the Government stands squarely on the written provisions of its contract. The contract involved, its terms on the provisions of the specifications for repairs. We say simply that the words and the intent of the contract and the specifications are clear and unambiguous. That this was a contract between people who on both sides were in the shipping business and in the business of operating and repairing vessels, all of them experts in their respective fields. In short, none of the parties were, as we might say, innocents abroad. From the writing in this contract there could have been only one meaning to the parties concerned, and that goes as well for the writing in the specifications. We feel that they are perfectly clear. [13]

This so-called extra work was not in any sense extra, it was only work that the libelant was obliged and obligated to do only in accordance with

the clear meaning of the contract and the specifications for repairs. It was an open type contract with an opportunity to inspect and to bid on the basis of the specifications and on the basis of the inspection to be made by the contractor, and all of the work was subject to changes and alterations by inspectors, provided for in the specifications, Navy inspectors and Coast Guard inspectors.

Now we are prepared to go into the question of the extra work, item by item, and will show that it was only work that the contractor should have performed. There was nothing extra and there was nothing exceptional. There has been no allegations or charges of fraud. We don't propose that we shall have to meet them and I think that that concludes my statement, and we may then proceed.

The Court: Call your first witness. [14]

Wednesday, December 16, 1953—9:30 A.M.

(Following opening statements by counsel for the respective parties, the following proceedings were had.)

The Court: Call your first witness.

Mr. Cline: Mr. Blake.

WILLIAM CLAIR BLAKE

called as a witness on behalf of the libelant, having been first duly sworn, testified as follows:

The Court: Your full name, please?

A. William Clair Blake.

Q. Spell your last name?

(Testimony of William Clair Blake.)

A. B-l-a-k-e.

Q. Where do you reside, Mr. Blake?

A. 264 Mallorca Way.

Q. San Francisco? A. Yes, sir.

Q. Your business or occupation?

A. Vice-president and general manager of Triple A Machine Shop.

The Court: Take the witness.

Mr. Cline: Yes, your Honor. [2*]

Direct Examination

By Mr. Cline:

Q. Now, Mr. Blake, you are—what is your business and profession?

A. I am a marine engineer.

Q. And you are connected, are you, with the Triple A Machine Shop, Inc., the libelant in this matter? A. Yes, sir, I am.

Q. What is your capacity?

A. Vice-president and general manager.

Q. And what particular part of the work of the firm do you handle?

A. Take care of the management plus the bidding, estimating and general running of the firm.

Q. And the work of this firm is primarily devoted to ship repair, is that right?

A. Yes, sir.

Q. Are you familiar with the bid that was made on the five lifeboats that are involved in this action?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of William Clair Blake.)

A. Yes, I made the bid.

Q. Calling your attention to the specifications which by our stipulation in this matter I believe would be Exhibit No. 2, (Respondent's Exhibit No. 2, Pre-trial Order) (Also Respondent's Exhibits B and C, Request for Admission of Facts and Genuineness of Documents.) [3-A] and the proposal or invitation to bid, which I believe would be Exhibit No. 4 by our stipulation, (Respondent's Exhibit No. 4, Pre-trial Order—Exhibit No. 3 in evidence) [3-B] and the actual form of bid, the actual bid that was put in, which I believe is Exhibit No. 5, (Respondent's Exhibit No. 5, Pre-trial Order—Joint Exhibit No. 4 in evidence.) [3-C] I will show you those documents, or I will show [3] you these exhibits, namely, the specifications for the repair of five lifeboats and the invitation to bid and the actual form of bid and copy of bid that you put in, and ask you if you have seen these documents before?

A. Yes, sir.

Q. And you saw them in connectinon with the bidding on these five lifeboats? A. Yes, I did.

Q. From whom did you get these documents?

A. From the Military Sea Transportation Service, at 33 Berry Street.

Q. All right. And after you received the copy of the specifications and the invitation to bid and copy of the bid, did you inspect the five lifeboats that are referred to in the invitation?

A. Yes, I did—only for the repairs——

(Testimony of William Clair Blake.)

Q. Where were the boats when you inspected them?

A. They were over at the Oakland Army Base.

Q. And now referring to the specifications for the repair of the five lifeboats, I will ask you to refer to this and particularly this (indicating), what is called Category A items, and ask you if you referred to that in connection with your inspecting the boats and arranging for your bid on the job?

A. Well, on the Category A items on this one lifeboat were [4] the engine repairs, I looked over the lifeboat in the way of the engine, to the overhaul of the engine only, as specified under Category A.

On the other lifeboats I looked over just what is specified, to renew the thwarts or to renew a plate, the starboard side bilge plate. That's all we looked at, because that's all that is specified under Category A. And we determined and made our bid as to just what work was involved under Category A.

Q. Now later—your firm was low bidder on the job, is that right? A. Yes, sir.

Q. And you did start, took possession of the five lifeboats and removed them to your shop, did you?

A. That's right, sir.

Q. Where is your place of business?

A. Pier 64 in San Francisco.

Q. That is, you have rented Pier 64 for your operation? A. Yes, sir.

Q. And adjoining territory for your offices and so on? A. That's right

(Testimony of William Clair Blake.)

Q. And during the course of this construction work or this repair work as described in Category A of the specifications, you were required, were you, to do certain other and additional work?

A. Yes, sir. [5]

Q. That is the work that is referred to in your libel in this matter, is that right?

A. That's right, sir.

Q. Now was that additional work apparent when you inspected the boats?

A. No, sir, you couldn't see that work that was involved, because you would have to disassemble the boats over at the Oakland Army Base and take them all apart, put them back, and you can't disassemble and destroy Government property. They wouldn't let you.

Q. Well now, tell me about the construction of these lifeboats. Do they have tanks or floats of some kind in there?

A. Yes, sir, the tanks are put in with straps. They are screwed into the wooden thwarts and they are always riveted into the hold of the ship, and the only way you could disassemble them is by taking them into the shipyard and taking the tanks out and then make your survey of the hull plates or the flooring involved. You couldn't see them where they were at.

Q. That is, the tanks and the flooring covered up this work that you were later required to do?

A. That's right, sir. It couldn't be determined.

Q. This additional work that is referred to in your libel didn't become apparent and you weren't

(Testimony of William Clair Blake.)

directed to do it until after the boats, lifeboats had been brought to your [6] plant?

A. That's right, sir.

Q. And after the tanks had been taken out and the flooring had been taken out, is that right?

A. When the repairs had got under way.

Q. Now the exterior of the lifeboats; were they painted or unpainted or——

A. As I remember, the boats were all painted and the shell plates as specified in the specifications were clearly marked, "Renew," just written on there.

Q. So that if there were any pit marks or rust holes or anything on the exterior of the boat, that had all been covered with paint?

A. That's right, sir, you couldn't tell.

Q. And the plates that were for renewal as specified were marked, you say, in yellow pencil?

A. Yes, sir.

Q. Now referring to your bid, which is apparently Exhibit 5-A in evidence, (Respondent's Exhibit No. 5, Pre-trial Order) (Also Respondent's Exhibit H—Request for Admission of Facts and Genuineness of Documents.) [7-A] I will call your attention to the document and ask you if this is a carbon copy of your original bid that is in evidence?

A. Yes, sir.

Q. Now it is a two-sided document, is that right?

A. Yes, sir.

Q. And the face of it here as we are now looking at it, has [7] the heading, "Category A Items—"

(Testimony of William Clair Blake.)

that is, the face or the front of the document, is that right? A. Yes, sir.

Q. And was this the only bid that you submitted?

A. Yes, sir.

Q. And was this the only document that your firm signed in connection with bidding on these five lifeboats? A. Yes, sir.

Q. That is, other than subsequent job orders or something, is that right?

A. Yes, that's right.

Q. Now what is the meaning in the business of ship repair of this heading, "Category A Items"?

A. Category A items is for a definite amount of work, and a price to do "X" amount of work as specified.

Q. That is, such as——

A. Under that classification.

Q. Appears in the specifications in connection with this particuar job? A. That's right.

Q. The Category A items are expressly set forth in this——

A. Under Category A, that's right, sir.

Q. And your bid was just on Category A items, is that right, sir? A. That's right. [8]

Q. $3,775? A. Yes, sir .

Q. And that bid in the form that it now stands was accepted, is that right? A. Yes, sir.

Q. Now this same form of bid, or this exact document here, also below the Category A items, and the contract or the bid for the Category A items,

(Testimony of William Clair Blake.)

also has a heading, "Category B Items," is that right? A. Yes, that's correct.

Q. And Category C Items?

A. That's right.

Q. Now those are covering items, indefinite items or items which may or may not be done?

A. That's right, sir. There was none.

Q. There were none in these specifications?

A. No, there was none in that specification.

Q. And you listed none?

A. That's right, sir, there was none there.

Q. As I understand it, you didn't contemplate bidding on anything other than what you did bid on here, Category A items?

A. That's all they asked for. It wasn't in the specifications.

Mr. Cline: That's all at this time. You may have the [9] witness.

The Court: Do you want to introduce the contract in evidence?

Mr. Cline: Well, is that made a part—maybe—no. In the pre-trial—maybe I didn't proceed correctly on this.

Counsel, Mr. Hogan, and I thought a quick way or an easy way, expeditious way of getting these documents in evidence was to refer to the pre-trial order. Now, before the pre-trial order was made, the Government submitted a request for admission of Genuineness of certain documents. They are the same documents that are listed by brief reference and number in the pre-trial order.

(Testimony of William Clair Blake.)

Also as a pre-trial procedure the libelant, through myself, filed a request for admission of the genuineness of two letters that I have referred to. Now we thought that, rather than taking them out of the file individually and having them stamped, we could with the Court's approval stipulate that these documents that are referred to in the pre-trial order that was made in this matter—well, it doesn't seem to bear a date—made in this matter a few weeks ago could go by stipulation—be in evidence bearing these same exhibit numbers here, like for instance this pre-trial order, it says, Respondent's No. 1, Contract MST-235, dated—now, that is the master contract that I have referred to.

Now if this is going to cause confusion, I would much [10] prefer that we back up and go ahead in the usual course of taking these documents and——

The Court: Well, the usual course is this. You have been examining the witness on the stand in relation to this contract. Of necessity it will have to go into evidence by either one side or the other; that is, if I follow you.

Mr. Cline: Yes.

Mr. Hogan: Your Honor, here was my original thought. All of these documents are now, I believe, in evidence in any event, because they were admitted as genuine pursuant to admissioin of facts, and the genuineness of documents exchanged between the two of us.

I was going to suggest that the Clerk mark them as joint exhibits in accordance with the number as

(Testimony of William Clair Blake.)

set out in the pre-trial order. Then we could refer to these documents as we take them up with the witness under that particular number. If the Court will just enter an order, I mean, admitting them all in evidence.

Mr. Cline: Well, suppose we do this, and it won't take very long. Would this be agreeable to the Court and counsel, that right now we go through these——

The Court: Anything will be agreeable to the Court. I will join you gentlemen if you agree on whatever you want to do.

Mr. Cline: Yes. [11]

The Court: And I will do the best I can.

Mr. Cline: Then we would offer as a joint exhibit for both sides the contract numbered MSTS-235, dated February 10, 1950, which is the master contract that I have referred to.

The Court: That you have been examining the witness on?

Mr. Cline: No, this is——

The Court: Now we have had an examination of this witness on what contract is this?

Mr. Hogan: The specifications.

Mr. Cline: On the specifications and bid.

The Court: That is what I want.

Mr. Cline: If I could amplify in this way, your Honor, if I can amplify it—before they are eligible to bid and before they can be accepted as a Government contractor for government work, they have

(Testimony of William Clair Blake.)

to join in the signing of what is called a master contract that applies to all contractors.

The Court: I understand.

Mr. Cline: And that, I haven't examined the witness on that, but it is in evidence because we do rely on it and I guess the Government relies on it too.

But after some months, after that master contract was signed, then the Government called for bids on five lifeboats. I have just examined this witness, Mr. Blake, in reference to the Government's invitation to bid, which included the specifications; and then also in connection with the bid itself, [12] which they put in. And we hadn't—I didn't in connection with Mr. Blake directly refer to the contract, because it is admitted on both sides that they did.

The Court: Pass the contract up that you are examining him on. What is that?

Mr. Cline: Where are the specifications?

The Court: Here, here's the copy.

The Witness: You have got that.

Mr. Cline: Oh, is that the copy you have?

The Witness: Yes.

The Court: Is that the duplicate?

The Witness: No, this thing here, this is the wrong one.

Mr. Cline: This, may it please the Court, is a duplicate copy of the original, or one—I guess the the original is—I guess that was the one that was originally in evidence, isn't it, Mr. Hogan?

Anyway, we admit that this is a duplicate copy

(Testimony of William Clair Blake.)

of the specifications of the five lifeboats that were up for repair.

The Court: Now you show him that; what is that?

Mr. Cline: And this is a document, the invitation or proposal calling for bids to do the work specified in that document, and then attached to it is a carbon copy of this exact bid for doing the work, and as this witness has testified, the document there, the specifications in addition to having general language about, in the preamble, about doing [13] whatever may be necessary, then they set forth Category A.

The Court: I understand.

Mr. Cline: And their bid—I have examined this witness with reference to their bid, which only is Category A.

The Court: And what is this document?

Mr. Cline: This is their carbon copy of their exact bid.

The Court: Where is the exact bid?

Mr. Hogan: It's Exhibit 4 in evidence.

(Respondent's Exhibit No. 5, Pre-trial Order.) (Also Respondent's Exhibit H—Request for Admission of Facts and Genuineness of Documents.) [14-A]

The Court: Pass it up. I just want to familiarize myself with it, that's all. Do you have it?

The Clerk: I don't know which one it is, your

(Testimony of William Clair Blake.)

Honor. I have two documents here and that's replete with attachments, here.

Mr. Cline: Well, I think maybe we had better, probably, just be a lot simpler to do this in the ordinary fashion, perhaps, and Mr.——

The Court: I could make a pretense I fully understand this, but we are discussing a document and when you examine the witness on it, I want to get the feel of it myself.

Mr. Cline: That's right. I think we had better do this a little more slowly and without——

Q. (By Mr. Cline): Now Mr. Blake, did your firm, the Triple A Machine Shop, Inc., sign a general master contract with the Government covering ship repair generally? A. Yes, sir. [14]

Q. That contract did not refer to any particular job, did it? A. No, sir.

Q. The master contract was an over-all contract that would govern your responsibility and the Government's, if you later got any contracts with the Government for ship repairs, is that right?

A. That's right.

Q. I will show you here a document which says, "Contract MSTS-235," dated February 10, 1950, and ask you if this is the contract that was signed by your firm and the Government for ship repair?

A. Yes, sir.

Mr. Cline: We would ask this be introduced in evidence as joint Exhibit No. 1.

(Respondent's Exhibit No. 1, Pre-trial

(Testimony of William Clair Blake.)

Order.) (Also Respondent's Exhibit A—Request for Admission of Facts and Genuineness of Documents.) [15-A]

The Court: Let it be admitted and marked.

Q. (By Mr. Cline): Now then, Mr. Blake, I had asked you some questions and asked you with reference——

The Clerk: Joint Exhibit No. 1 admitted and filed in evidence.

(Whereupon Contract dated 2/10/50, described above, was received in evidence and marked Joint Exhibit No. 1.)

JOINT EXHIBIT No. 1

(Heretofore Printed at Pages 25 to 33 of this Record.)

Mr. Cline (Continuing): To a job for the repair of five lifeboats. I will show you again the documents that [15] we referred to a few minutes ago, and when you testified that the respondent Government had furnished your firm with the specifications and invitation to bid, the specifications were in the form, this is the copy that you got?

A. Yes, that's right.

Mr. Cline: Then we will ask that the bid or the specifications for the five lifeboats' repair be introduced as a Joint Exhibit No. 2,

(Testimony of William Clair Blake.)

(Respondent's Exhibit No. 2, Pre-trial Order.) (Also Respondent's Exhibits B and C—Request for Admission of Facts and Genuineness of Documents.) [16-A]

Now, let's see if we can find——

The Court: Let it be admitted and marked next in order.

Mr. Cline: This is the specifications.

The Clerk: Joint Exhibit No. 2 admitted and filed in evidence.

(Whereupon specifications referred to above were received in evidence and marked Joint Exhibit No. 2.)

JOINT EXHIBIT No. 2

(Hertofore printed at pages 34 to 50 of this record.)

Q. (By Mr. Cline : And then I showed you a proposal or invitation to bid on this five lifeboat job, and I will show you here from the file what appears to be the invitation to bid on five lifeboats, invitation being dated September 21, 1950, and consisting of five pages, and ask you if that is the proposal or invitation to bid that you received from the respondent in this matter in reference to the repair of the five lifeboats. A. Yes, sir.

(Testimony of William Clair Blake.)

Mr. Cline: We would ask that this be introduced in [16] evidence as Joint Exhibit No. 3.

(Respondent's Exhibit No. 4, Pre-trial Order.) (Also Respondent's Exhibit G—Request for Admission of Facts and Genuineness of Documents.) [17-A]

The Court: Let it be admitted and marked next in order.

The Clerk: Joint Exhibit No. 3.

(Whereupon Invitation to Bid dated 9/21/50, referred to and identified above, was received in evidence and marked Joint Exhibit No. 3.)

Mr. Hogan: What was No. 2?

Mr. Cline: I beg pardon?

Mr. Hogan: What was No. 2?

Mr. Cline: No. 2 was the specifications, the contract was 1, the specifications were 2, invitation to bid is 3.

Mr. Hogan: Very well.

Q. (By Mr. Cline): Now, I call your attention and I examined you in reference to the bid that you submitted on this particular job for repair of the five lifeboats. A. Yes.

Q. And this document here that I show you, the same one I examined you about—that is your bid?

A. Yes, sir.

The Court: Dated——

Q. (By Mr. Cline): This bid being dated September 29, 1950, and being for repair——

(Testimony of William Clair Blake.)

The Court: Bid No. P51-64, Triple A Machine Shop, Inc., libelant herein, submitted his bid for repair of five lifeboats for a total price of [17] $3,775.

Mr. Cline: That's right, your Honor. That's it.

The Court: All right.

Mr. Cline: We will offer this in evidence as Exhibit No. 4.

(Respondent's Exhibit No. 5, Pre-trial Order). (Also Respondent's Exhibit H—Request for Admission of Facts and Genuineness of Documents.) [18-A]

The Court: It may be admitted as next in order.

The Clerk: Joint Exhibit No. 4 admitted and filed in evidence.

(Whereupon Bid dated 9/29/50, referred to above, was received in evidence and marked Joint Exhibit No. 4.)

JOINT EXHIBIT No. 4

(Hertofore printed at pages 58 to 60 of this record.)

Cross-Examination

By Mr. Hogan:

Q. Mr. Blake, you testified that you were a marine engineer, is that correct? A. Yes, sir.

(Testimony of William Clair Blake.)

Q. What qualifications do you have as a marine engineer? A. I am a licensed——

Mr. Cline: Well, I object to it as incompetent, irrelevant and immaterial. We are not here involved in engineering problems.

The Court: Well, this a preliminary question. He may answer.

Mr. Cline: Okay.

A. I am a licensed marine engineer by the United States Goast Guard as a chief engineer on ocean-going vessels of any gross tons, any [18] ocean.

Also I am a Commander in the United States Naval Reserve. I have been a chief engineer of many naval vessels.

Q. (By Mr. Hogan): Have you had experience in ship construction work? A. Yes, sir.

Q. How long have you been with Triple A?

A. Four and a half years, sir.

Q. Where had you had your experience in ship construction work?

A. Triple A Machine Shop, plus during the war I was at the Long Beach Naval Shipyard and with the Army Transportation Corps in San Francisco, when the war was over in conversions and to numerous repairs.

Q. Now you testified, I believe, that your work at Triple A involved the management, bidding, estimating and so forth? A. Yes, sir.

Q. Further, that you inspected these particular lifeboats? A. Yes, sir.

(Testimony of William Clair Blake.)

Q. You inspected them at Oakland?

A. Oakland Army Base, that was.

Q. Now what was their condition when you inspected them. How were they located?

A. They were sitting over by a little house at the Oakland Army Base. There's a little building, there was a crane there where the man used to hang out. It was right alongside of [19] them. I climbed up inside the boats——

The Court: In or out of water, sir?

Q. (By Mr. Hogan): They were in dry storage, in other words? A. Yes.

Q. Now did you have any trouble identifying those boats?

A. No, we asked the man. Fact is, I think at that time we had to go to the Provost Marshal and we asked the man; they sent us through the—into that storage over there, and we reported to a watchman that had a house there.

Q. Well, the boats that you examined are the boats under discussion here, is that right?

A. Yes, sir, pretty sure.

Q. Those are the boats upon which you reported to your superiors? A. Yes, sir.

Q. Now did you make any reports to your superior?

A. No, I came back with the specifications and sat down and made the bid. It is my writing on the bid.

(Testimony of William Clair Blake.)

Q. Did you make any notes while you were over there?

A. Only what's on the specification. I don't recall.

Q. Did you make any notes in your own handwriting?

A. Yes, sir, the specifications are my writing on there.

Q. Are these the specifications?

A. Yes, sir.

Q. Where is your writing on there? [20]

A. These aren't—that isn't my writing.

Mr. Hogan: May I have the Court's copy of the specifications, please? It must be here somewhere.

The Witness: Mr. Cline has it.

Mr. Cline: Here's the copy with the writing on it if you want to refer to it.

Mr. Hogan: May I see that copy?

Q. Now, will you show me the writing on there in your own handwriting that constituted your notes on the repairs?

A. That's my writing with the money. Here's—those lines are mine; I can tell. That's my writing. That's my writing (indicating), that's my writing, that's all my writing there.

That's mine. All this is my writing, sir, "Provision tanks N.G.," all this is my writing.

Q. Those constitute all of the notes which you made relative to these repairs? A. Yes, sir.

Mr. Hogan: Your Honor, I don't know whether the one in evidence is an exact copy of this, but you may want to look at those.

(Testimony of William Clair Blake.)

The Court: Is this the one that I suggested might go into evidence?

Mr. Cline: It is in evidence, your Honor, as Exhibit No. 2.

(Respondent's Exhibit No. 2, Pre-trial Order. Also Respondent's Exhibits B and C—Request for Admission of Facts and Genuineness of Documents.) [21-A]

The Clerk: This is the one right here that is in evidence. [21] This is the one right here.

Mr. Hogan: But it doesn't contain those penciled notes on it. This is the original which he had.

The Court: Do you offer it in evidence?

Q. (By Mr. Hogan): Is this the set of specifications that you used in examining the lifeboats?

A. Yes, sir.

Q. Can you identify them as such?

A. Yes, sir; I took that over to Oakland with me. It is my writing.

Mr. Hogan: I see. Then, if the Court please, at this time I will offer this document, Specification No. MSTS P51-64, dated 20 September, 1950, into evidence.

The Court: Let it be admitted and marked.

The Clerk: Respondent's Exhibit A admitted and marked in evidence.

(Whereupon copy of Specifications identified above was received in evidence and marked Respondent's Exhibit No. A.)

(Testimony of William Clair Blake.)

RESPONDENT'S EXHIBIT A

[Respondent's Ex. A is identical to Ex. C attached to the Answer set forth at pages 36 to 42.]

Mr. Hogan: Would the Court desire to see this now?

The Court: You may pass it up.

(Examining.)

Q. (By Mr. Hogan): You made no further notes? A. No, sir.

Q. No further breakdown? [22]

A. No, sir.

Q. Or anything relative to the repairs, than the notes which you have on there?

A. That's all, sir.

Q. Now, on the basis of those notes you made this bid?

Mr. Cline: I object to it as assuming something not in evidence. He didn't say on the basis—this is all he had, it is all he had on the notes.

He had a lot of matters in mind when he checked over the boats. I object to the question.

The Court: Read the question, Mr. Reporter.

(Record read.)

The Court: He may answer. Objection overruled.

The Witness: The question was——

(Testimony of William Clair Blake.)

Mr. Hogan: Would you read the question again, Mr. Reporter?

(Record reread.)

A. No; also what I kept in my mind. I didn't write down everything. What I saw and what I had in my mind, I made my bid, plus discussing it with my associates. [23]

Mr. Hogan: Now, if the Court please, I have here a letter from Mr. J. Thaddeus Cline, to the Department of the Navy, Military Sea Transportation Service, listed in the pre-trial order as Item 2 under libelant's pre-trial exhibits. This document has been admitted by the respondent as being genuine and I assume that we can consider that it is now in evidence and I ask the Court that it be marked as Joint Exhibit number 14.

(Respondent's Exhibit B in evidence; also Libelant's Exhibit No. 2, Pre-trial [24-A] Order.)

The Court: Exhibit 14, dated when?

Mr. Hogan: It is a letter from Mr. J. Thaddeus Cline, dated November 14, 1951, addressed to the Department of the Navy, Military Sea Transportation Service.

The Court: Let it be admitted and marked next in order.

Mr. Cline: Then following the procedure that we started, may I ask that the letter be withdrawn from wherever it is now and taken out and separately

(Testimony of William Clair Blake.)

marked, because I can see we are going to get into considerable confusion.

(Thereupon discussion between Court and counsel as to procedure to be followed in the marking of exhibits.)

(Thereupon letter from J. Thaddeus Cline to Department of the Navy, Military Sea Transportation Service, dated November 14, 1951, received in evidence and marked Respondent's Exhibit B.)

RESPONDENT'S EXHIBIT B

[Respondent's Exhibit B is identical to Ex. A attached to Libelant's Request for Admission, etc., set forth at pages 80 to 84.] [24]

Q. (By Mr. Hogan): You have had experience prior to the experience with these particular five lifeboats here in inspecting lifeboats for the purpose of ascertaining repairs required?

A. Yes, sir.

Q. These weren't the first ones?

A. No, sir.

Q. And you are thoroughly familiar with the construction of these lifeboats and where the parts are and so forth?

A. Reasonably, yes, sir.

Q. Well, you inspected them, did you not?

A. Yes, that is right, sir.

(Testimony of William Clair Blake.)

Q. Presumably they have confidence in you?

A. Well——

Q. I want you to examine those items that are listed there. Now, relative to Item number one, 298 square feet of shell plate, I believe that you testified that all of these items that are supposedly extra repairs, were not visible, is that correct?

A. That is right, sir.

Q. What is the shell plate on the lifeboat?

A. It is the side of the boat.

Q. Couldn't you see the side of the boat?

A. The exterior of the boat was in very good condition. You could not see the interior of the [25] boat.

Q. Didn't you get into them? You said you climbed into them.

A. You couldn't see behind the tanks. The same as those chairs, if they were solid chairs, you couldn't see in behind them.

Q. Well, you are a marine engineer, are you not?

A. That's right, sir.

Q. You say that you inspected prior lifeboats for your Company? A. Yes, sir.

Q. What is the usual condition of air tanks, that sort of thing, when they come out of the lifeboat, that is, in open storage?

A. Well, if the tanks have been renewed in the past year—be up to Coast Guard rules—they are in good shape.

Q. Well, had these been?

(Testimony of William Clair Blake.)

A. I don't know. There is no indication in the specifications.

Q. Well, would it have been apparent to you from observation whether they had been renewed within the last year?

A. No, sir, because the paint job—the boats had been painted—sitting in open storage—and the boats had been well preserved but you couldn't see.

Q. If there were any rust, you couldn't see the rust?

A. No, sir, not even behind the tanks.

Q. Well, what is the usual condition of the hull behind the tanks where there is metal to metal? [26]

A. Well, sometimes it is in good shape and sometimes it is in poor shape. It is actually not metal to metal.

Q. Well, is it something that you can anticipate?

A. No, sir. Not unless you can see it.

Q. You said sometimes it is and sometimes it isn't. If you are inspecting, can't you anticipate what that condition would be?

A. No, sir. You would have to know. You would have to look at it.

Q. I know. But now you are getting together data here for submission to your employers for the purposes of bidding on a contract for repairs——

A. Only under——

Q. Can't you take that into consideration?

A. Well, sir, you ask me to bid on the specifications. The specifications under the category A said to overhaul the motor. That's all it said. It

(Testimony of William Clair Blake.)

didn't say to look at the tanks. Although when I got up in the body I could look—the body was apparently in very good condition because it was well painted. You can't take the tanks out. They would have you in a——

Q. Now, I show you Joint Exhibit Number 2, (Respondent's Exhibit No. 2, Pre-trial Order.) (Also Respondent's Exhibits B and C—Request for Admission of Facts and Genuineness of [27-A] Documents.) the specifications for repairs. Did you have this complete document with you?

A. Yes, sir.

Q. I ask you to read the opening paragraph on those [27] specifications.

A. Yes, sir. (Reading.)

Q. Now, were you aware of that clause originally? A. Yes, sir.

Q. At the time you made this inspection?

A. Yes, sir.

Q. And what is the next sentence?

A. (Reading.)

Q. Were you aware of that when you made this inspection? A. Yes.

The Court: Take a recess for a few minutes.

(Short recess taken.)

Mr. Hogan: If the Court please, at this time I would like to make inquiry of counsel as to whether they will stipulate to the introduction in evidence of the schematic drawings that I have here of a lifeboat of this type.

(Testimony of William Clair Blake.)

The Court: Very well.

Mr. Cline: I think there are two kinds, aren't there—two different sizes?

(Discussion between counsel.)

Mr. Hogan: You are not willing to stipulate?

Mr. Cline: Well, I don't know.

(Discussion between counsel.)

Mr. Cline: I couldn't stipulate to that.

Q. (By Mr. Hogan): Now, directing your attention then, Mr. [28] Blake, to this letter of November 14, 1951, items of repairs set out therein. Item number 2 is listed, "All floors in four lifeboats."

What is the floor in the lifeboat?

A. The floor is the portion of the lifeboat that runs horizontally and it is a formed piece of metal that the wood sits on, and also acts as a straightening member of the body.

Q. I see. Now, are those floors visible?

A. No, sir.

Q. If you get down inside the boat you can't see them at all?

A. Oh, I guess if you took some tanks out of the way or some gear out of the way you—you couldn't see them—no, you couldn't see them to make a survey or examination of them, no. You could see them—put your finger down there and touch them maybe, but you couldn't, because it is in between floor boards.

Q. I see. Now, those floors are metal?

(Testimony of William Clair Blake.)

A. Yes, sir.

Q. Are they galvanized? A. Yes, sir.

Q. Now, in inspecting lifeboats for your people from time to time—and you have indicated that you have inspected a good many, is that correct? [29]

A. Yes, sir.

Q. With what frequency do you find the floors in those lifeboats rusted?

A. Well, it depends on the condition. I have found them in very good condition.

Q. I know it depends upon the condition. I am asking you the frequency.

Mr. Cline: Well, just a minute. May it please the Court, I haven't made any objection up to this point. I didn't realize it was going to proceed along, but I do object to this line of questioning as being wholly incompetent, irrelevant and immaterial, not within the issues of the case here. Their own evidence shows that this libelant bid on category A, and category A only. The bid was accepted. Now all this other talk about the rest of these lifeboats, and so on, has no bearing on the case here.

(Further argument and answer on the objection.)

The Court: The objection will be overruled. Let us proceed.

Q. (By Mr. Hogan): Now, will you answer my last question, Mr. Blake?

A. Will you state the question again. I don't recall it.

(Testimony of William Clair Blake.)

Q. I asked you what—with what frequency you found these flaws in lifeboats, rusted floors? [30]

A. Not——

Q. In the numerous times you have inspected them?

A. Not too often. You don't find them too often if the boat is taken care of properly and cleaned out.

Q. How many times approximately?

A. I don't know.

Q. Say out of ten inspections or ten lifeboats?

A. Well, we had a boat with—we had a ship with 22 lifeboats on the General Anderson, and I would say that ten apparently had new floors in them.

Q. All right. A. Maybe less.

Q. Those lifeboats on the—what did you say, the General Anderson? A. Yes, sir.

Q. Were they covered, did they have tarpaulins over them? A. That is right, sir.

Q. Did these in the Oakland Army Base have tarpaulins over them? A. No, sir.

Q. They were open and exposed, weren't they?

A. One thing, the General Anderson's boats, I don't know if they had tarps over them.

Q. Let's not get into the General Anderson's boats. You said they did and that's good [31] enough.

A. Well, I don't——

Q. In any event, the ones in Oakland were exposed?

A. The ones I saw were exposed in the open.

(Testimony of William Clair Blake.)

Q. How were they stowed, bottom side up or top side up? A. Top side up.

Q. So they could fill with water, could they not, if it rained? A. That is right, sir.

Q. Now, going to item 3, what are the margin boards in a lifeboat?

A. That's an item here, "Approximately 270 square feet of number one lumber for margin board." That's the boards that go around the shell of the lifeboat and they act as a straightening member or a seat or for stowing water tanks or such.

Q. What kind of lumber is it made of?

A. Well, Douglas fir, most of the time.

Q. Is any part of it metal, or is it all lumber?

A. Sometimes—well, it depends on the boat. I have seen them metal, I have seen them wood.

Q. Well, where is it here, the bottom, near the side, the gunwale? A. No, the side.

Q. Can you see it?

A. That is right, sir. [32]

Q. It is visible? A. Yes, sir.

Q. Do you recall what the condition of the margin boards were in these lifeboats?

A. No, sir.

Q. Didn't you look at them?

A. Under the specification that I bid on——

Q. I am not asking about that. I am asking you whether you saw these margin boards.

A. Well, I climbed in the boat. I looked—I probably looked at the whole boat but didn't specifically

(Testimony of William Clair Blake.)

look at the margin boards. Apparently they were all right.

Q. Well, you could see them if you had looked?

A. If I had looked at them I could have seen them.

Q. All right. Now, what are the "Hand gear propelling sockets"?

A. Hand gear propelling sockets?

Q. Yes.

A. Well, they are the—these types of boats are not oar propelled but are hand propelled and the thing sits in the (indicating)——

Q. Well, what is it, an oar that goes through the bottom of the boat?

A. No, sir; it is—the people in the boat—it is what they call a self-propelled lifeboat. [33]

Q. Yes?

A. And this is a board that people grab to work it—it is a socket—it is a metal socket.

Q. And what do they do, they pull back and forth on this?

A. That is right, sir, and it makes it propel——

Q. Is the socket something that actually the propelling unit fits into? A. That is right, sir.

Q. What is that made out of?

A. Metal, I assume. It would be out of aluminum.

Q. Where is it locked? Is it locked in the bottom of the boat? A. Yes, sir.

Q. Is there any flooring in these lifeboats, in the floors that we have been discussing, but planking?

A. Yes, sir.

(Testimony of William Clair Blake.)

Q. Is it solid planking? A. No, sir.

Q. You can see in between?

A. That is right—put your finger in between it. It is pretty hard to see.

Q. Can you reach down through it?

A. No, sir.

Q. Can you put a flashlight under it? [34]

A. You could, but you could only see where the flashlight went. You couldn't see this way or this way.

Q. Well, could you see these propelling sockets?

A. Yes, you could see them.

Q. Well, did you look at them?

A. No, sir. I don't recall.

Q. Now, the next item, these galvanized iron tank straps. What are they?

A. Galvanized iron tank straps?

Q. Yes.

A. Well, this is what puts the tanks—the tanks are removable tanks in the body.

Q. What tanks, what are they?

A. What tanks?

Q. The air tanks or provision tanks?

A. Yes. And——

Q. These straps strap the tanks to the boat?

A. That's right, sir.

Q. Well, what do they do? Do they attach to the sides of the boat?

A. To the wooden—this part of the boat, yes, sir.

Q. Are they—— A. They are screwed in.

(Testimony of William Clair Blake.)

Q. Are they visible? A. Some are. [35]

Q. Well, how many?

A. Oh, I don't know. You can see the front of the strap but you couldn't see the strap that goes under the second tank or the bottom of a tank because it is hidden.

Q. Well, could you see fifty per cent of them?

A. No.

Mr. Cline: Object to that——

Q. (By Mr. Hogan): You couldn't see fifty per cent? A. It depends upon the lifeboat, too.

Mr. Cline: Just a minute.

A. ——

Q. (By Mr. Hogan): Well, you could see some of them, couldn't you?

A. You could see some of them most of the time.

Q. If you inspected them could you tell what their condition was by looking at them?

A. No, sir.

Q. Why?

A. Because where it was painted it was in good shape, but underneath the tank or where it was screwed in the wood might have been rotten or the Coast Guard inspector or the M.S.T.S. inspector mightn't pass it. It might be up to what he thinks is okay. He might think it is all right.

Q. Now, among marine inspectors, is there any test to be given [36] for rust in metal?

A. Among marine inspectors?

Q. Yes.

A. Well, you gauge the metal by either drilling

(Testimony of William Clair Blake.)

or beating. They have a new metal gauge that will gauge the metal.

Q. Can you also by tapping with a hammer?

A. That is one way that they do.

Q. Did you make any drill tests either on the shell plates or on the floor boards or on the tank straps?

A. You couldn't drill. You're in the field where the boat is—all you could do—if you even raised a hammer, you're destroying Government property. Our job was to bid on only what was specified in the specifications. [37]

Q. How about these aluminum tank straps?

A. What about them?

Q. Well, didn't you see those?

A. I have it on other boats where the aluminum is out—where you can see it is painted, but underneath the tanks you can't see it.

Q. All right. How about these "thwarts"? What are these thwarts?

A. That is what you sit on. That's the seats.

Q. What are they made out of?

A. Made out of wood, some are made out of metal, some aluminum.

Q. Are they visible? A. They are.

Q. Can you see them? A. Yes, sir.

Q. Can you observe—can you from observing them get an over-all idea of their condition?

A. No, sir.

Q. Why?

(Testimony of William Clair Blake.)

A. Because if the boat is well painted, and it apparently had been repaired, it looks good and taken care of—but that may not be satisfactory to the MSTS or the Coast Guard, they may want to renew them. You can't tell. Visibly it may be [38] perfect.

Q. You can reasonably anticipate, though, on the basis of and from your experience, can't you?

A. No, you can't.

Q. Well, how many lifeboats have you inspected? Give me an estimate.

A. Well, you mean since I have been in business or——

Q. Any time.

A. Oh, I have inspected lots of lifeboats. I won't say how many. I would say hundreds of them. Let's put it that way.

Q. All right. Now——

A. I'm not a specialist at it.

Q. What are the "life lines" and "floats on boats"? A. What's that, sir?

Q. Life lines and floats?

A. Well, alongside the side of the boat, in case the lifeboat should fill with water or turn upside down during launching, they have a safety factor that a life line goes around a boat, and that is—it has a—it has a little wooden knot that will float so that a man can grab it so in case the boat is flooded with water, were the lifeboat submerged, and it will only submerge so deep, a man can grab them and still hang on.

(Testimony of William Clair Blake.)

Q. Are they visible? A. Oh, yes.

Q. You can see them; you can inspect them?

A. You could. [39]

Q. Can you tell from looking at them? I mean as a marine surveyor, what their condition is?

A. Well, I could and I couldn't, because in my opinion they may be in good shape but to the MSTS inspector or the Coast Guard, he wouldn't pass them, he wants something new.

Q. Well, isn't that a calculated risk that you have to take?

A. No, because it doesn't specify to say that work, unless you are told to renew it. You bid——

Q. Will you tell me what a "slash railing" is?

A. Yes. The slash railing is in the forward end of the boat or it could be in the after end of the boat, where you lash down the sails or the gear that is in the boat.

Q. Is that outside or inside so that you can't see it? A. You could see it.

Q. If it were affected by the weather, cracked, you could see that?

A. If you went looking for it, yes.

Q. And presumably the items listed here of 24 hanging clips for slash railing, 24 sockets for slash railing, are all parts that go on the slash railing?

A. That is right, sir.

Q. And they are visible?

A. Yes. You lash the line through it.

Q. And where they are visible, you can see them?

A. That's right. [40]

(Testimony of William Clair Blake.)

Q. You can inspect them?

A. That is right.

Q. What are these two plates and doublers in the last item?

A. Well, I suppose they are just what they say, they are two plates and two doublers.

Q. Well, what part of a lifeboat are they?

A. Well, I mean, you can have doublers on the bottom or at the forward end of the board.

Q. Well, of a shape pieces? What are they made of? A. Oh——

Q. Describe them. Just describe these doubling plates.

A. That we installed on the boat, that we put on the boat. I don't know where we installed them.

Q. You don't know? Can you tell from looking at this letter where they were installed?

A. I have never seen that letter.

Q. Well, do you recall the replacement or the renewal of the two plates and two doublers on there?

A. No, I don't. I didn't handle this job after it came into my shipyard.

Q. You don't know how that got on there at all?

A. Well, sure, it was probably done—it was probably ordered by the Government or the inspector to do this work, yes. But where they are at or where it was renewed, I don't recall where, no, [41] sir.

Q. Now, from time to time in your work—in your testimony you have referred to certain requirements, things that you are required to do from

(Testimony of William Clair Blake.)

time to time by either the Navy inspector or the Coast Guard inspector, is that right?

A. Yes, sir.

Q. Do you normally work closely with those people? A. Well, sure.

Q. On a job of this type?

A. If they are called in on it, yes, sir.

Q. Now, if you are instructed to accomplish certain repairs or to do certain things relative to making repairs by the Navy inspector or by the Coast Guard inspector, do you do that?

A. If it is on a field order, yes, sir.

Q. If it is on a field order?

A. Well, we bid on lifeboats to do what is specified in the specifications.

Q. I know what that is. I know what you are required to do.

A. Well, that's what we do.

Q. I am just asking you if——

A. Well, the Navy inspector and the Coast Guard inspector work together, and the Navy inspector tells us what to do. He gives us an order or he says it is in the specifications.

Q. Now, from your experience, you know that there is going to be an inspector on these jobs, don't you?

A. Yes—well, we know that there will be a Navy inspector [42] but we don't know there will be a Coast Guard inspector on there.

Q. All right. Now, were you required on this

(Testimony of William Clair Blake.)

particular job to do certain work by the Navy inspector and by the Coast Guard inspector?

A. Well, we were required to do work by the Navy inspector now but not by the Coast Guard inspector.

Q. All right. But you knew that this work is subject to inspection? A. Oh, yes.

Q. And approval?

A. The work that is specified, yes.

Q. And you know that it has to conform, don't you, to certain specifications?

A. Only what you bid on.

Q. I mean with respect to the lifeboat and what goes in it?

A. Well, yes; good marine practice.

Q. Well, not only practice, it is the law, isn't it?

A. Yes.

Q. On the basis of these specifications, and I don't know whether I asked you to read this sentence, but I will ask you to read it now, in the specifications——

Mr. Cline: What sentence are you referring to?

Mr. Hogan: I will advise him.

Mr. Cline: Well, I have a right to know the question you [43] are asking the witness.

Mr. Hogan: I am asking him to read that sentence, the fourth sentence (referring to Respondent's Exhibit A, page 2, fourth paragraph).

(Respondent's Exhibit No. 2, Pre-trial Order. Also Respondent's Exhibits B and C—Request

(Testimony of William Clair Blake.)

for Admission of Facts and Genuineness of Documents.) [44-A]

Mr. Cline: Just a moment. Is there some reason you don't want to tell me what you are calling the witness' attention to? I object to——

Mr. Hogan: None whatsoever.

Mr. Cline: Well, may it please the Court, I will ask the witness be instructed not to proceed with this until I know what——

The Court: What page is this?

Mr. Hogan: They are in evidence, the specifications. You have a copy of them.

Mr. Cline: For some reason Mr. Hogan won't tell me what he is calling to the attention of the witness.

Mr. Hogan: Here, you may look at it.

Mr. Cline: All right. What are you calling his attention to?

Mr. Hogan: Sentence number four on the page.

Mr. Cline: That is the question you asked him to read and which he read into evidence a few minutes ago. Object to it as already asked and answered.

The Court: Read it, in the interests of time. Let's get through. [44]

Mr. Hogan: If I did, I apologize, your Honor. It slips my mind as to whether he read it.

The Court: Read it.

The Witness: The fourth?

Mr. Hogan: That is correct.

A. (Reading): "All work shall be subject to in-

(Testimony of William Clair Blake.)

spection and approval by the U. S. Coast Guard and the U. S. Navy inspector assigned."

The Court: That wasn't read into the record. It does not disclose it.

Mr. Hogan: It does now, your Honor.

The Court: It does now. It wasn't read from.

Mr. Cline: I understood it to be.

The Court: Well, I will stand corrected. The reporter is here. I was about to ask this question myself, whether during the course of this work it was inspected. This is the first time that I have——

Mr. Cline: Yes——

The Court: All right. Let's proceed, gentlemen.

Q. (By Mr. Hogan): Now, Mr. Blake, I presume that you are familiar with this master ship repair contract, the Triple A has with MSTS; am I correct in that assumption? A. Yes.

Q. I will show you Article 5-J, page 11, of this contract, and ask you if you will read the first sentence for the purposes [45] of the record?

A. (Reading): "The Government does not guarantee the correctness of the dimensions, sizes and shapes set forth in any job order, sketches, drawings, plans or specifications prepared or furnished by the Government"——

Mr. Hogan: Thank you. That's all, your Honor.

(Testimony of William Clair Blake.)

Redirect Examination

By Mr. Cline:

Q. Well, Mr. Blake, you have just been called upon to read a provision in the specifications that your work had to be—the work would be subject to the inspection of the Coast Guard—the job that you have been testifying about, that is, 5 lifeboats—they are inspected by the Coast Guard?

A. Yes, sir.

Q. The job you did was accepted by the Coast Guard, accepted by the Navy?

A. The work that we did on them was accepted and passed by the Coast Guard.

Q. And the other work, the extra work, was that also accepted by the Navy and the Coast Guard?

A. That is right, sir.

Q. Every bit of work that you have testified to here had been accepted and approved and passed by the Coast Guard and the Navy? A. Yes, sir.

Q. Now, you have also been asked a question as to what you [46] do in the course of a job under a contract when you are told to do some certain work by the inspector. Under your contract you have to go ahead with whatever you are told to do, is that right? A. That is right, sir.

Q. And that was done in this case, is that right?

A. Well, sir, we bid on this contract to do this "X" amount of work. The Coast Guard inspector and the Navy inspector came down and found this additional work that was not specified under Cate-

(Testimony of William Clair Blake.)

gory "A"; he requested an extra for the work and they took it up with—had a meeting at their office and came back and said, No, that we will discuss it later and that you will have to proceed with the work—we proceeded immediately with the work.

Q. That is, you could not hold up the job while—— A. No, sir.

Q. ——while you were discussing as to how much you were to be paid and so on?

A. No, sir. We proceeded with the work immediately because they needed the boats. Time is the essence in this busines, so that you don't hold up ships that cost thousands of dollars a day. When they told us that it was either in dispute or that we should proceed, we proceeded with the work without question.

Q. Now, as I understand, the actual repair work is not handled by you personally, is that right? [47]

A. No, sir.

Q. Once the job, and particularly on these five lifeboats, are brought into your shop——

A. Yes, sir.

Q. ——that ends your responsibility except as to general firm management, is that right?

A. That is right, sir.

Q. And the work is then handled under whom?

A. That's right, sir; under Mr. Fell.

Q. Now, you were asked some questions on cross-examination about the lifeboats on the General Anderson. By reason of what happened in this particular case of these five lifeboats, did you follow

(Testimony of William Clair Blake.)

the same procedure in the General Anderson that you did in these lifeboats?

A. Yes, sir, we did. And the Navy came down because we had a little time——

Mr. Hogan: I object, your Honor.

The Court: The objection will be sustained.

Mr. Cline: I thought it had been opened up on cross-examination and we could follow it.

The Court: Not as to the condition of them, only the general question about how many were there.

Mr. Cline: Well, may I ask——

Mr. Hogan: We did not go into the question of the details on those lifeboats, and we are not interested in them, your Honor. [48]

Mr. Cline: But you have opened up the subject on cross-examination. I think I have a right to follow this up to ask him what was done in those cases. We want to show, and we think we have a right to——

The Court: What was done in those cases?

The Witness: You want me to answer?

The Court: Yes.

A. We got into a sort of a dispute that they wanted additional work done.

The Court: This is the evil of this thing.

Mr. Hogan: Yes, I object, your Honor.

The Court: Sustain the objection.

Mr. Cline: Well, you were asked on cross-examination as to whether you could tell in advance as to whether an inspector would or would not pass a part of a lifeboat.

(Testimony of William Clair Blake.)

A. That is right, sir.

Q. Now, was there on the General Anderson, in the lifeboats on the General Anderson, a great and extreme difference of opinion between the inspectors themselves? A. Yes.

Mr. Hogan: I object, your Honor.

The Court: Objection sustained. Let it go out.

Mr. Hogan: I object to going into this aspect of the matter.

The Court: What is your—— [49]

The Witness: I'm sorry. You're waiting for me to answer?

The Court: No. But you looked rather surprised on my ruling. Didn't you?

The Witness: No. I thought you wanted me to answer and I was sitting here waiting. I'm sorry.

The Court: No. I'm a pretty good observer here. I have been running a long time.

The Witness: No, I thought you were waiting for me, and I was asleep.

The Court: No, I am waiting for you—I am here to observe your people. All right.

The Witness: I'm sorry.

Mr. Cline: Then, as I understand it then, Mr. Blake, in making your bid in this action that was accepted and is now in evidence, you considered and appraised what you felt would be the cost of the labor and material to do the job specified in category "A"?

A. Oh, yes, that's right. They came in——

Q. Nothing else.

(Testimony of William Clair Blake.)

A. They came in with all this additional work and we asked for an extra, and they said, no. But we said that we did not bid on anything except what was specified under category "A," that the general terms and conditions were instructions to us and that we felt that under category "A," [50] that's what our price was put on and that's what we bid on.

Q. And when you returned your bid to the Military Sea Transportation Service—you returned your bid to the Military Sea Transportation Service, did you? A. That is right, sir.

Q. And you were generally notified that it was accepted? A. Yes, sir.

Q. Now, was there any question raised by the Military Sea Transportation Service as to the fact that your bid specifically on its face showed it covered only category "A" items?

A. As specified, that is right, sir.

Q. Well, I say, was there any question raised by them as to your bid having——

A. No, sir—no, sir, they accepted our bid under category "A," and the boats were put in our custody, and we proceeded with repairs under category "A," and they tried to throw in these additional repairs.

Mr. Cline: I think that is all.

(Testimony of William Clair Blake.)

Recross-Examination

By Mr. Hogan:

Q. Mr. Blake, after the bid is accepted, the contract and so forth is let, based on your experience, with Triple A and M.S.T.S., what is the document that issues out of M.S.T.S. that puts the thing in operation, do you know? [51] A. Yes, sir.

Q. What is that called?

A. A job order. That doesn't come in until weeks later, sometimes a month later, after the job is done.

Q. It is part of the contract, though, isn't it?

A. The contract says that you will proceed on issuance of a job order but you don't get it—the administrative end of it doesn't go on for weeks or months.

Q. Nevertheless, the job order is part of the contract, isn't it, when it does issue?

A. Well, whatever is stated in there.

Q. Well, isn't it? A. Yes, sir.

Q. Would you recognize this job order?

A. Well, that is a job order issued by the government, yes, sir.

Q. Does it indicate to you where this job order relates to this particular contract?

Mr. Cline: What was that question again?

A. Well, it is a photostatic copy. I mean, we had done lots of lifeboat jobs. I will take your word.

Mr. Hogan: You have never seen it, Mr. Blake?

A. I have never seen it, I believe.

Mr. Hogan: I think that is all, your Honor.

(Testimony of William Clair Blake.)

The Court: Is that all from this witness? [52]

Mr. Cline: Yes, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Cline: Now, may it please the court, the libelant rests except as to the matter of clearing up the exhibits here, certain exhibits, which I would be glad to—in fact two of them—to read into evidence.

The Court: Very well.

Mr. Cline: If we may.

Referring to the letter that has been introduced in evidence, the letter from the Navy Department, Military Sea Transportation Service, Washington 25, D. C., dated October 22, 1951, and addressed to the libelant, subject——

Mr. Hogan: Which?

Mr. Cline: This is the letter of October 22, 1951, from the M.S.T.S. It is—let's see.

Mr. Hogan: Is that attached to your request for admissions of fact?

Mr. Cline: No. It is attached to yours.

Mr. Hogan: October 22?

Mr. Cline: Yes.

Mr. Hogan: That is attached to yours, I think, Exhibit B, your request for admissions of fact.

Mr. Cline: Oh, is that attached to mine? [53]

Mr. Hogan: Yes.

Mr. Cline: Well, then, I knew it was in evidence.

This letter is from the M.S.T.S., addressed to the libelant in this matter, and it is in reference to this particular contractual matter and in reference to the appeal that had been filed in Washington. It says:

"Gentlemen:

"Commander, Military Sea Transportation Service, Pacific, has forwarded to this office your claim in the amount of $5,392.00 for additional compensation in connection with contract MST-235, job order number 10. Pertinent correspondence from your representative, Mr. J. Thaddeus Cline, indicates that you desire to appeal under Article 14 of subject specifications. However, there appears to be a question regarding the interpretation of specifications, which would seem to be more accurately covered by Article 5-(j).

"Kindly advise whether you desire to appeal these matters under Article 5(j) of subject specification, and whether you wish to submit further evidence to substantiate your claim.

"Yours very truly,

"W. H. von DREEL,

"Captain, USN, Director, Maintenance and Repair Division."

And the reply to that letter, which is also in evidence, a letter from myself as attorney for the [54] libelant, dated November 14, 1951, addressed to the Department and the same reference and to the writer of the other letter:

"Dear Sirs:

"Your letter of October 22, 1951, addressed to Triple A Machine Shop, Inc., has been referred to the undersigned for reply.

"The said contractor had been advised by your local office that its claim should be handled as a dispute under Article 14 of the Master Contract. It was for this reason that the appeal referred to the said section.

"The suggestion contained in your said letter that the appeal might well be considered under Article 5(j) is sincerely appreciated. It is quite possible that the last mentioned section would give your office greater latitude in considering the merits of said contractor's claim than you would have under Article 14.

"Instead of electing to appeal under one article or the other, it would seem more appropriate to appeal under both of said articles. This would surely enable your office to consider the said claim from all possible angles. You are, therefore, respectfully notified that said contractor does appeal under Article 14 and also under Article 5(j). [55]

"To assist your office in arriving at a just decision, a few pertinent facts will be briefly commented upon.

"Triple A Machine Shop, Inc., was the low bidder on the lifeboat job here in question. The said company submitted its bid on the specifications prepared by the Government. So far as was known to anyone or that could be ascertained from inspecting the

boats, the specifications completely covered all necessary repairs.

"In going ahead with their contract and in order to do the work set forth in the specifications, the tanks were removed. The Coast Guard and M.S.T.S. inspectors then came on the job and condemned certain plates and parts of the boats. Pursuant to a letter dated October 16, 1950, from the Office of Deputy Commander, Military Sea Transportation Service, Pacific, Triple A Machine Shop, Inc., was required to do the following specified extra work. There seems to be some error in referring to the charge for said extra work, in that your letter of October 22 refers to the figure of $5,392. The extra work done, as aforesaid, is hereinafter listed with proper charge for each of the items, namely:"

And then we list several items, showing price after each one, [56] that have been referred to by Mr. Hogan, and then—or the items that have been referred to by Mr. Hogan, and then the total price, $6,342.

"No one can dispute the fact that the contractor could not possibly have known that the above-listed parts were defective. Likewise, the Government could not have known that the boats required any repairs other than as expressly listed in the specifications. Even the inspectors could not have determined that additional work would be required until after the tanks had been removed by the contractor.

"It cannot be claimed that the Government knew of the existence of these extra defects; because if such were the case, then the failure to include the

same in the specifications would have amounted to a positive fraud and deception on the part of the Government.

"On the other hand, if the Government did not know of these defects that were hidden by the tanks, how can it now be claimed that the contractor could or should have known of their existence?

"Contracts of this kind should, in every instance, be fair, open and above board. Government prepared specifications should not be a trap for the unwary. A bid should always be a fair estimate of the value of [57] the labor and material required to effect a certain specified job. A bidder on a Government job should not be required to surmise, guess or gamble as to the nature and extent of the job in question.

"It is, therefore, respectfully urged that the appeal be sustained in favor of the contractor and that an order be made to pay said contractor the full reasonable value of said extra work."

And then one other letter that is in evidence—does your Honor wish to take the adjournment?

The Court: Take the adjournment until two.

Mr. Cline: Thank you, your Honor.

(Thereupon a recess was taken until 2:00 o'clock p.m. this date.) [58]

Wednesday, 16 December, 1953, 2:00 P.M.

Mr. Cline: With the Court's indulgence, I would like to read a couple of other letters that are in evidence, read them in evidence, and Mr. Hogan first referred to a letter from Military Sea Transport, addressed to Triple A Machine Shop under date of October 16, 1950, being the letter asking certain additional work be done. This letter of October 16, 1950, is addressed to the libelant.

(Respondent's Exhibit No. 12, Pre-trial Order. Also Respondent's Exhibit L—Request for Admission of Facts and Genuineness of Documents.) [59-A]

(Whereupon counsel read the above-mentioned letter to the Court.)

And the reply to that letter, being a letter from myself as attorney for the libelant, dated October 20, 1950, and addressed to the Military Sea Transportation Service.

(Whereupon counsel read the above-mentioned letter to the Court.)

And then one further and final letter, and which is the letter of June 16, 1952, from the Department of Navy, Military Sea Transportation Service, in Washington, D. C., and addressed to the libelant in connection with the appeal that had been filed in Washington.

(Whereupon the letter above referred to was read to the Court.)

I would like to ask leave of the Court if I might recall Mr. Blake for a couple of further questions on redirect? [59]

The Court: You may.

Mr. Cline: Mr. Blake.

WILLIAM CLAIR BLAKE

recalled as a witness for the libelant, having been previously duly sworn, testified further as follows:

Further Redirect Examination

By Mr. Cline:

Q. Mr. Blake, when you were on the stand before and on cross-examination you were interrogated by Mr. Hogan as to the various items of additional work particularly as set forth in my letter of November 14? A. Yes, sir.

Q. Those items are the same items that make up the claim that we are now contesting here in court, is that right? A. Yes.

Q. That is referring to the shell plates and floors and other work you referred to?

A. That's right.

Q. Were any of those items included in your bid?

A. No, sir; they were not included in the bid, because they weren't specified to be repaired under category A.

Q. That's right. Now, you say that you saw the general specifications which included provision, in substance, that it was the intent of the parties to put the lifeboats in proper condition of repair, is that right? [60] A. Yes, sir.

(Testimony of William Clair Blake.)

Q. Now, is that the usual situation in repair work that the contractor who has the prime contract would be called upon to do any work that develops or it becomes apparent during the course of the job that needs to be done?

A. Yes, they issue you field orders and negotiate a price with you to proceed with the additional repairs that they specify.

Q. So that it was understood here that if you got the bid and after you started the job additional work developed, you could be required to do it?

A. Yes, sir.

Q. But no one requested you to put in a bid on any such additional work?

A. No, sir; only what was specified under the category A, that is what we bid on.

Mr. Cline: I think that is all.

Recross-Examination

By Mr. Hogan:

Q. It has been testified, Mr. Blake, that supplemental job orders were issued as was customary, I believe, jobs of this type, is that correct?

A. Field orders are issued.

Q. Job—— A. ——and supplemental——

Q. Supplemental. What is the purpose of [61] that?

A. To accomplish additional repairs and make a determination for payment.

Q. I see. Now, I show you again the specifications. That is, I believe, Joint Exhibit 2? (Respondent's Exhibit No. 2, Pre-trial Order.)

(Testimony of William Clair Blake.)

The Clerk: Yes.

Q. (By Mr. Hogan): And ask if you will, please, if you will read into the record the seventh sentence?

A. "Replacements of deteriorated tanks shall be accomplished only on a written field order."

Q. Was that supplemental field order issued in connection with the replacement of the tanks in this case? A. Yes, sir.

Q. Will you examine the specifications and tell me whether there is any provision in those specifications for the issuance of other field orders other than with respect to those air tanks?

A. I'll have to read it all.

Mr. Hogan: Well, the document speaks for itself.

Mr. Cline: Stipulated there is no such provision.

The Witness: Referring now——

Mr. Hogan: Stipulate there is no other provision?

Mr. Cline: That the only provision in there as to field order——

The Witness: Referring to what?

Q. (By Mr. Hogan): I am referring to this contract. [62]

A. Well, this, see, we bid on.

Q. Just referring to what you bid on—I am asking you if there is any other provision in there authorizing the issuance of a supplemental job order to cover any other work other than those air tanks as provided?

(Testimony of William Clair Blake.)

A. No, because this is all I bid on.

Mr. Hogan: That is all I want to know. Just answer the question. That is all, your Honor.

Redirect Examination

By Mr. Cline:

Q. There is nothing in there anywhere that says if any additional work should develop being required by the inspector that that would be done for free here, is there?

A. No, sir; in your master contract provisions are made that any additional work will be negotiated by the Government at an equitable to the Government and to the contractor and you will be paid for it; only bid on work as specified.

The Court: Was that done here in this case?

The Witness: No, sir; the Government wouldn't pay us.

The Court: Why?

The Witness: Because we bid under items under this category A, give them a price of $3,200, something like that, and we bid on that, and additional work came up and the Government said no, we won't give you a field order [63] for it, it is in the basic contract, and we said we feel we didn't bid on that, you couldn't see it.

The Court: Any further questions?

Mr. Hogan: No further questions.

The Court: Step down.

(Witness excused.)

Mr. Cline: Libelant rests, your Honor.

Mr. Hogan: Mr. Ames.

RAYMOND R. AMES

called as a witness on behalf of the defendant, sworn.

The Court: Your full name, please?

The Witness: Raymond R. Ames.

The Court: How do you spell your last name?

The Witness: A-m-e-s.

The Court: Where do you live?

The Witness: 841 Teresita Boulevard, San Francisco.

The Court: Your business or occupation?

The Witness: Head planner and estimator, M.S.T.S., Pacific.

The Court: Estimator for who?

The Witness: M.S.T.S., Pacific; Military Sea Transportation Service, Pacific.

The Court: How long have you been so engaged?

The Witness: 1950. [64]

The Court: 1950?

The Witness: 1950.

The Court: And what is the nature of your work?

The Witness: I am a head planner and estimator. I give out the work to the planners and estimators to make their inspections and write up specifications on work for the M.S.T.S.

The Court: You have been doing that kind of work since 1950?

The Witness: At M.S.T.S., Pacific.

(Testimony of Raymond R. Ames.)

The Court: Prior to that time?

The Witness: Prior to that time I was at the Long Beach Naval Shipyard for seven years.

The Court: In what capacity?

The Witness: Head planner and estimator for the Long Beach Naval Shipyard.

The Court: All right, take the witness.

Direct Examination

By Mr. Hogan:

Q. Mr. Ames, I show you Joint Exhibit number 2 (Respondent's Exhibit No. 2, Pre-trial Order); (Also Respondent's Exhibits B and C—Request for Admission of Facts and Genuineness of [65-A] Documents), which are specifications for repairs of five lifeboats, ask you to examine them. Are you familiar with them? A. Yes.

Q. Were those specifications prepared under your supervision? [65] A. They were.

Q. And with your knowledge? A. Yes.

Q. Were they prepared in your office in September or October, 1950, under your supervision?

A. Yes.

Q. Now, did you have anything to do with letting the contract for these repairs?

A. No, sir, that was let by the contract section.

The Court: Speak up so the reporter can hear you. Who?

The Witness: By the contract section.

The Court: Contract section?

The Witness: Yes, sir.

(Testimony of Raymond R. Ames.)

Q. (By Mr. Hogan): Did you know in October who ultimately was awarded the contract?

A. Yes, sir.

Q. Who was awarded the contract?

A. Triple A Machine Shop.

Q. And that contract incorporated those specifications?

Mr. Cline: Objected to as calling for the opinion and conclusion of the witness.

The Court: If he knows he may answer.

A. Yes, this was part of the contract.

Q. (By Mr. Hogan): Now, I ask you to note in that document [66] certain specified items listed under category A, and what do those items represent, what was to be accomplished under those items?

A. All the work outlined in these specifications, plus any other work as outlined by the Coast Guard inspector.

Q. Now, did you have other classifications of work, such as classification B?

A. Not on this specification.

Q. Well, do you have such a classification?

A. There is, yes.

Q. Are there any in those specifications?

A. No, sir.

Q. Now, do you know why not?

Mr. Cline: Objected to as calling for the opinion and conclusion of the witness. The specifications themselves are the best evidence of what they include.

Mr. Hogan: These specifications are drawn, your

(Testimony of Raymond R. Ames.)

Honor, under this man's supervision. He is the best one and only one able to tell as to what was to be covered under those specifications.

Mr. Cline: What may have been in the mind of this one person in the M.S.T.S. Service is certainly not material and not binding on the contractor, unless so communicated to him. The document otherwise speaks for itself, it is a matter for the Court to determine. [67]

The Court: Will you read the last question?

(Record read by the reporter.)

The Court: Reframe your question.

Q. (By Mr. Hogan): Do you know why there were no class B items listed in those specifications?

Mr. Cline: The same objection, may it please the Court. The contractor cannot be bound by what was in the mind or the intent of some one individual connected with the M.S.T.S. service unless it is communicated to him. What was in his mind is purely a matter of opinion that couldn't be binding on this Court.

The Court: Are you familiar with this contract?

The Witness: Yes, sir.

The Court: What is the B contract, so-called?

The Witness: Category B item? That is an indefinite item, so-called indefinite item which we get a bid on, a separate bid for from the contractors when we are not certain whether we are going to do the work or not, and separate bid price.

The Court: There is none in this contract?

The Witness: None in this contract.

(Testimony of Raymond R. Ames.)

The Court: Proceed.

Q. (By Mr. Hogan): Now, those category A items that are listed there, what is contemplated by them?

Mr. Cline: Same objection, may it please the Court, [68] it is the opinion and conclusion of this witness what he may have had in his mind, is not binding upon the Court or the libelant.

The Court: We are limited to the contract, the contract will have to speak for itself.

Mr. Hogan: Very well, your Honor. Withdraw the question.

May I have Respondent's Exhibit B, (Libelant's Exhibit No. 2, Pre-trial Order.) a letter to Mr. Cline, November 14?

Q. I show you Respondent's Exhibit B, which is not in evidence, and in particular page two thereof, and the list of items that are contained therein which have been testified to be repairs made on these lifeboats. Are those category A items?

Mr. Cline: Objected to as calling for the opinion and conclusion of this witness.

The Court: If he knows he may answer. Objection overruled.

A. These are category A; these are part of the contract, yes.

Mr. Hogan: I think that is all.

(Testimony of Raymond R. Ames.)

Cross-Examination

By Mr. Cline:

Q. Mr. Ames, you've said that the contract, this contract was awarded to the Triple A Machine Shop, is that right? A. Yes, sir. [69]

Q. The contract consisted, did it not, of the submission of a bid by Triple A? A. Yes, sir.

Q. That was accepted by the Government?

A. Yes.

Q. And that was the contract, is that right?

A. That's right, this was the contract.

Q. Well, no, now——

Mr. Hogan: Your Honor, I object. Mr. Ames has testified that he did not let this contract, merely drew the specifications.

Mr. Cline: But over the objection this witness testified that this contract was let to Triple A and he said it embodied certain things. I am trying to find out what document he is talking about as the contract——

Mr. Hogan: I don't know whether——

Mr. Cline: There is only one contract, that is the master——

The Court: The contract he has in his mind there?

Mr. Cline: No, what he has in his mind is a set of specifications. This is not a contract, may it please the Court.

The Court: Where is the contract?

Mr. Cline: The contract is the bid here, this de-

(Testimony of Raymond R. Ames.)

fendant's exhibit or the Joint Exhibit 4, (Respondent's Exhibit No. 5, Pre-trial Order.) which is the bid of the Triple A Machine Shop, Incorporated. That is [70] the contract.

The Court: Total price $3,775, repairs to five lifeboats. This is Joint Exhibit 4, is it?

The Witness: Yes, your Honor.

Mr. Cline: Yes, your Honor.

The Court: Counsel, do I understand this is the contract we are talking about and discussing here?

Mr. Hogan: No, your Honor, the specifications are part of the contract. You have the master ship repair contracts, you have the specifications. The specifications relate directly to the master ship repair contract. That is the bid submitted on the job. That is the bid. That is part of the contract.

The Court: Now, let's get ourselves together, those specifications, hand them to me.

Mr. Cline: Yes, your Honor.

The Court: Hand them to me, please. Is there another portion of this contract?

Mr. Hogan: Yes, your Honor.

The Court: What is it and where is it?

Mr. Cline: The master contract——

The Clerk: Here is one.

The Court: Is this the master contract?

Mr. Hogan: Here is the invitation to bid.

The Court: That isn't what I am talking about now.

Mr. Hogan: The master contract is right [71] here.

(Testimony of Raymond R. Ames.)

The Court: It is here in evidence?

Mr. Hogan: That is correct.

Mr. Cline: That's right.

The Court: Exhibit 1, Exhibit 4 and Exhibit A. All right, proceed.

Q. (By Mr. Cline): Now, Mr. Ames, you will refer to this Exhibit 4, (Respondent's Exhibit No. 5, Pre-trial Order.) and show me where on there there is a bid for anything other than the items involved in category A?

A. There are none.

Q. In other words, this bid expressly states—starts with a heading category A, repair five lifeboats, total $3,775? A. That's right.

Q. And this bid for $3,775 for category A was accepted by the Government, is that right?

A. By the contract section, yes.

Q. All right. Now, referring to the specifications that are referred to in this bid—— A. Yes.

Q. ——I will ask you to take these specifications and turn to the portion that is designated as category A? A. Page 4.

Q. Have you located it? A. Page 4.

Q. Page 4, and isn't it 4 and 5? [72]

A. Yes.

The Court: Will you be good enough to read it?

The Witness: Page four and five?

The Court: Yes, please.

The Witness: "Item 1—Repair Gas Driven Boat—43 Person:

"Open and examine gas engine (Gray Marine

(Testimony of Raymond R. Ames.)

Lugger Seascout 91, four cylinder, engine #D20387) and completely overhaul the engine and accessories. The contractor shall remove the head, disassemble the engine and examine all moving parts. The contractor shall examine valves, seats, springs and keepers, grind valves and seats or replace same if found to be beyond economical repair, clean and remove carbon. Examine cylinders, pistons, piston rings, rods, bearings, and machine, refit or replace parts found worn or defective, thoroughly clean entire cooling system, remove and overhaul carburetor and distributor, starter, generator, fuel pump and other accessories, replace all worn or defective parts, clean and test gasoline tank and fuel lines from engine to tank, renew all ignition wiring and starter button, check engine foundation, clean and paint same. Reassemble engine, renew gaskets, defective studs, bolts and nuts, install new spark plugs, examine suction and discharge piping and valves, examine exhaust piping and manifold, repair [73] and slant or renew as required to place in serviceable condition. Make all necessary adjustments and tune up engine. Contractor to furnish material, labor and equipment and test engine. Examine, repair and adjust clutch and make up coupling.

"Open up the bilge pump (hand operated), examine, clean, free up, repair as necessary, assemble, renew suction and discharge hoses and test.

"The contractor shall remove propeller and propeller shaft, check shaft for straightness, straighten

(Testimony of Raymond R. Ames.)

and polish as required, clean and examine propeller, fair in leading and trailing edges, examine and clean stern tube and stuffing box, reinstall propeller and shaft, repack stuffing box and test for operation.

"Item 2: Repair Four (4) Lifeboats—77 Person:

"Boats (hand propelled), serial numbers A-5375, A-5114, A-5095 and A-5160. Location: Row one. Spaces 6, 15 and 16. Row #4, space 11 respectively. Builder: Welin Davit and Boat Corporation.

"Boat number A-5375. Remove starboard side bilge plate amidships, straighten to its original shape and contour and reinstall (approximately 15 square feet). Remove indentations from portside to restore shell to its original shape and contour as when new (approximately six square feet). [74]

"Boat number A-5114 and A-5095. Remove indentations from port and starboard shell to restore to its original shape and contour as when new (approximate total damage both boats twenty square feet).

"Boat number A-5160. Remove portside of bilge plate amidships, straighten to its original shape and contour and reinstall, (approximately 15 square feet). Remove small indentation from starboard side to restore shell to its original shape and contour as when new.

"Remove, reshape and/or renew the port and starboard grab rails and securing brackets.

"Remove propellers and propeller shafts, check shafts for straightness, straighten and polish as

(Testimony of Raymond R. Ames.)

required, clean and examine propellers, fair in leading and trailing edges, examine and clean stern tube bearings and stuffing boxes, reinstall propellers and shafts, repack stuffing boxes and prove operable.

"Open up and examine transmission, gears, shafts and bearings, clean up and make minor repairs to put same in operable condition. Repairs to or replacements of damaged or missing parts shall be accomplished only on a newly authorized written field order. Reassemble transmissions and fill with proper lubricant. Examine and free up propelling mechanisms (hand operated) and associated fittings, free up, renew missing or [75] deteriorated pins, screws, bolts, nuts and propelling handles, lubricate, assemble and make operable.

"Open up bilge pumps (hand operated), examine, clean, free up, repair as necessary, assemble, renew suction and discharge hoses and test."

Q. Now, you have read, have you, all of category A from the specifications?

A. I have read pages 4 and 5.

Q. That is right, you read entirely all of the document, did you, from the place where it is headed category A items, you read all of them thereon, did you? A. That's right.

Q. And nowhere in there is—withdraw that.

And the categories you have just read covered by designation the five boats that are involved in this lawsuit, is that right? A. Yes.

Q. And nowhere in that category A is there one of these items that you referred to and that are

(Testimony of Raymond R. Ames.)

referred to in this letter, Exhibit B, as being the items of extra work claimed by the Triple A?

A. Those items there are referred to in the other pages.

Q. But not categoryA, are they?

A. Not as so designated.

Q. That's right. [76]

Mr. Cline: That is all.

Redirect Examination

By Mr. Hogan:

May I have the specifications, please?

Q. Where, in the specifications, are other items not listed in category A provided for, Mr. Ames?

A. They are listed on pages two and three, which are part of the specifications.

Q. Any particular provision in those specifications——

The Court: Gentlemen, we have got the reporter here, and we ought to give him a chance to get this down.

Mr. Hogan: Very well, your Honor.

The Court: Just please speak up. Will you read the last question, please?

(Record read.)

Mr. Cline: May I object to that, may it please the Court. The document itself is the best evidence.

The Court: I want to get a record here. You may answer.

(Testimony of Raymond R. Ames.)

Q. (By Mr. Hogan): Is there any other place in those specifications that category A items are covered other than in the detailed data that you have just read to the Court?

A. On pages 2 and 3.

Q. Is there any specific provision in there that would [77] cover those items? A. Yes.

Q. What is that?

Mr. Cline: Is this all subject to my objection, may it please the Court, as being the opinion and conclusion of the witness, and the document itself is the best evidence of what it provides.

The Court: I anticipate he is going to read from the document.

Mr. Hogan: Yes, I am asking him to read——

The Court: Overruled.

The Witness: The first paragraph, page 2:

"It is the intent of these specifications to provide for the complete repair and reconditioning, both mechanically and structurally, of five lifeboats, all as necessary to place the boats in first class operating condition and ready for use.

"The work shall include, but shall not be limited to, any detailed specifications which follow."

Mr. Hogan: Thank you, Mr. Ames.

Any further questions?

(Testimony of Raymond R. Ames.)

Recross-Examination

Q. In other words, as you say it was the expressed intent that these boats would be put in proper condition? [78]

A. First class operating condition.

Q. But there is nothing in what you have read or any other part of the specifications that say that any extra work that may develop will be part of category A, is there? A. Well——

Q. I think you can answer that yes or no, if you——

Mr. Hogan: I don't think he can.

Mr. Cline: Certainly he can.

The Court: I can't anticipate what he can or cannot do without examining the witness. Let him speak.

Mr. Cline: Will you read the question?

(Question read.)

A. No, there is no mention of category A.

Q. The only mention of category A is what you read a few moments ago in detail as to each boat, isn't that right? That is all they said in those specifications that had any designation of category A, isn't that right? A. The——

Q. Is it or is it not?

The Court: Just a moment, let the witness answer.

The Witness: The first pages, 2 and 3 are, in my

(Testimony of Raymond R. Ames.)

consideration, category A, part of the job. They couldn't——

Q. (By Mr. Cline): Go ahead.

A. You couldn't strip the boats unless you had the first two pages, pages 2 and 3. [79]

Q. That's right. There is no question, Mr. Ames, as to a desire on your part to have the boats put in shape. But what I am asking you if it is not a fact that there is not one word in the specifications that says that if any extra work develops during the course of the job, that that will be part of category A? A. No, there is no mention of that.

Mr. Cline: Thank you.

Mr. Hogan: That is all, Mr. Ames.

(Witness excused.)

Mr. Hogan: Mr. Griffin.

WILLIAM H. GRIFFIN

called as a witness for the defendant, sworn.

The Court: What is your full name?

The Witness: William H. Griffin.

The Court: How do you spell your last name?

The Witness: G-r-i-f-f-i-n.

The Court: Where do you live, Mr. Griffin?

The Witness: I live at 891 Clara Drive, Palo Alto.

The Court: Your business or occupation?

The Witness: Shipbuilder.

The Court: Shipbuilder?

The Witness: Yes, sir.

(Testimony of William H. Griffin.)

The Court: Are you actively engaged in the business at [80] the present time?

The Witness: No, I am not.

The Court: When did you last engage in active business?

The Witness: I finished my last work with the Government the 17th of November.

The Court: Of this year?

The Witness: Yes, sir.

The Court: Proceed.

Direct Examination

By Mr. Hogan:

Q. You were employed by the Military Sea Transportation Service in October and November, 1950? A. I was.

Q. Where?

A. At Headquarters, 33 Berry Street.

Q. San Francisco? A. San Francisco.

Q. And in what capacity?

A. My title was marine inspector.

Q. What experience have you had as a marine inspector? A. Pardon?

Q. What experience have you had as a marine inspector?

A. Oh, possibly 20 years, approximately, as an inspector, inspector service.

Q. And with respect to what type of [81] vessels?

A. All types of vessels, both commercial and Navy.

(Testimony of William H. Griffin.)

Q. Now, in October and November of 1950, were you assigned any duties in connection with inspecting the lifeboats undergoing repairs in the Triple A Machine Shop yard? A. Yes.

Q. Now, Mr. Griffin, I ask you to take a look at the specifications for repairs to five lifeboats, Joint Exhibit number 2. (Respondent's Exhibit No. 2, Pre-trial Order.) I believe they are, and ask you if those specifications refer to those five lifeboats that you were detailed to inspect at that time?

Mr. Cline: We will stipulate they do.

A. To the best of my knowledge, it is, yes.

Q. (By Mr. Hogan): Now, during the course of your inspection of those lifeboats were you in contact with the Coast Guard inspector?

A. Yes.

Q. Do you remember who he was?

A. Yes.

Q. And when you're inspecting those jobs do you work closely together with the Coast Guard?

A. Very definitely.

Q. Are you from time to time contacted by the owner of the yard? A. Yes.

Q. And you from time to time contact them relative to the [82] work, is that correct?

A. Yes.

Q. Did you at that time make any reports to your superiors in the Military Sea Transportation Service, relative to the progress of this work?

A. During the repairs?

Q. Yes. A. Oh, yes.

(Testimony of William H. Griffin.)

Q. Was there some issue raised during that period of time as between the owners relative to certain work that was done on the lifeboats?

A. Yes.

Q. Did they come to you with those matters?

A. Triple A Machine Shop?

Q. Yes. A. Yes, I went to them.

Q. You went to them? A. Yes.

Q. Now, I show you for identification a report which purports to be signed by W. H. Griffin, ask you if you can identify that document?

A. Yes, that is my own handwriting. May I read it?

Q. You wrote that in your own hand?

A. Yes.

Q. And that is your own report, your own document? [83]

A. This is a sort of a little note.

Q. That is yours? A. That is mine.

Mr. Hogan: Your Honor, I ask that this be admitted in evidence.

The Court: It is dated?

Mr. Hogan: It is undated.

The Court: When was this made?

The Witness: At the completion of the work.

The Court: Can you fix the time as near as you can?

The Witness: Approximately, oh, I would say it was, I think it was October sometime or November; first of November sometime.

The Court: That will be admitted and marked.

(Testimony of William H. Griffin.)

Q. (By Mr. Hogan): Now, if you will just hold that document, please, for a moment. What was the occasion of that report?

Mr. Cline: What number is that?

Mr. Hogan: That will be respondent's number C, is that right?

The Clerk: Respondent's Exhibit C admitted and filed in evidence.

(Whereupon the handwritten report referred to above was marked Respondent's Exhibit C in evidence.)

(Testimony of William H. Griffin.)

RESPONDENT'S EXHIBIT C

The Triple "A" Machine Works, feels that the following items which have been replaced by the U. S. Coast Guard and myself—are not a part of contract, for the repairs of the 5 lifeboats, and should be accomplished on a field order. F. O. 9490.

Renew—146 Tanks, at $65.00 each.....	$9,590.00
Renew—All bands for securing tanks.....	200.00
Renew—12 shell plates and one shell double chafing plate	3,600.00
Renew—2 Sockets for Propelling units....	90.00
Renew—Inboard Margin Boards on 4 Lifeboats (Rejected by MSTS).....	352.00
Renew—All floors on 4 lifeboats.....	1,000.00
Renew—2 thwarts—(MSTS).....	150.00

/s/ W. H. GRIFFIN,
Inspector.

$ 200
3,600
90
352
1,000
150
$5,392

[Endorsed]: Filed December 16, 1953.

(Testimony of William H. Griffin.)

The Court: What is the question?

Mr. Hogan: I asked him what was the occasion of that [84] report.

A. This is the customary procedure at the completion of all contracts. We submit these to our superiors.

Mr. Hogan: Why was the report made?

A. The report——

Q. What did it deal with?

A. It deals with the work they were asking for field orders on.

Q. Who was asking for field orders?

A. Triple A Machine.

Q. Were those items—there was some question in their mind as to whether repairs should be made?

Mr. Cline: Objected to as calling for the opinion and conclusion of the witness, some question in their mind.

A. I don't see how there could be, I don't see how they could doubt it insofar as they were instructed to accomplish them.

Q. What I mean, Mr. Griffin, is was there some question about those repairs, is that why they came to you? A. Yes.

Q. Or you went to them?

A. No, they came to me, requested this work to be done as a——

The Court: Who came to you?

A. Triple A Machine. I don't know which man in particular, [85] could have been Mr. Blake, Mr. Engel, or it could have been somebody else.

(Testimony of William H. Griffin.)

The Court: All right, just a moment. Where would they come to?

A. At their plant, at the scene of the operations of the repairs.

The Court: And did you have a conversation with him?

A. Oh, yes.

The Court: What was the conversation?

A. Well, in general, they would feel——

The Court: "They" you say. You will have to identify them some way.

A. I don't know who it was.

The Court: All right to be honest.

A. I do not.

Q. (By Mr. Hogan): To the best of your recollection was it a representative from Triple A?

A. Certainly it was.

The Court: As a result of that conversation you wrote out this document, did you?

What is this document, please?

A. This is a summary, or a note that we, as an inspector, attach to the specifications that are given to us at the beginning of a job. When the job is completed we sign it off as completed, the day and date and submit anything on—— [86]

The Court: Did you submit this?

A. I did, to my superior, Mr. Willitts.

The Court: The people that did the job, are they familiar with this?

A. Yes, should be.

The Court: How should they be?

(Testimony of William H. Griffin.)

A. Well, because this work—they were instructed to accomplish it.

The Court: I will give up. Proceed.

A. Maybe that is not a clear explanation.

Mr. Hogan: Well——

The Court: It isn't that, but it cannot go in evidence unless the foundation is laid for this document and this writing.

A. Well, this is—was attached by myself. The heading of it, if I may read it——

The Court: Read it, subject to your motion to strike—read it, please.

A. "The Triple A Machine works feels that the following items which have been rejected by the U. S. Coast Guard and myself are not a part of contract for the repairs of the five lifeboats, and should be accomplished on a field order" and I enumerated the items.

The Court: Thank you.

A. To Mr. Willits. [87]

The Court: Who is Mr. Willits?

A. He was the head of the inspection service of the Military Sea Transportation.

The Court: Where is he?

A. Now he is still in the Military Sea Transportation.

The Court: Will he be available?

Mr. Hogan: I hadn't contemplated calling him, your Honor, thought I could establish this document through Mr. Griffin.

The Court: Not unless you connect it up in some

(Testimony of William H. Griffin.)

fashion. They are not bound in relation to any writing unless it is brought home to them in some manner. You have to establish that fact.

Mr. Hogan: Well, in view of the fact that Mr. Griffin prepared the document and has identified it, he certainly has expressed what it was written in connection with.

The Court: Yes.

Mr. Hogan: And that he was employed by Military Sea Transportation Service, made his report to the Military Sea Transportation Service.

The Court: Yes.

Mr. Hogan: And this is the document.

The Court: Yes.

Mr. Hogan: And it relates to the issue of certain repairs that were required on these lifeboats. [88]

The Court: Yes. Then what does it say?

Mr. Hogan: And he was the inspector at that time.

The Court: Yes.

Mr. Hogan: And he was the one that would have the most intimate knowledge of these particular——

The Court: No doubt about that, but what about the people that did the work, was that brought home to them? It has to be connected up before it can go in evidence.

Mr. Hogan: Well, I think we were just getting to that, I don't know.

The Court: Proceed.

Q. (By Mr. Hogan): Now, where did you

(Testimony of William H. Griffin.)

obtain the information in this report, do you recall?

Mr. Cline: May it please the Court, I would like to interpose an objection. On this whole matter Mr. Hogan and I spent considerable time working together and with the Court, Judge Goodman, in arriving at an agreement on a state of facts, which are embodied in a pre-trial order, and all this seems to be covered.

We agreed, and it is signed by the Court that, "During the months of October and November, 1950, libelant was required by Military Sea Transportation Service, Pacific, to perform additional work and furnish labor and materials to effect certain repairs to the said lifeboats." There is no dispute about it. [89]

Further: "That in October, 1950, Triple A Machine Shop, libelant herein, was required to perform the aforesaid additional work on the said five lifeboats and libelant was advised by the contracting officer, Military Sea Transportation Service, Pacific, that such additional work was covered under the specifications for repair, number MSTSP 51-64, job order number 10 and Master Ship Repair Contract MST-235. That libelant proceeded with said work under written protest and notice to the contracting officer that libelant would require payment of the reasonable value of said additional work."

Now, we have agreed to all that, no question that this work was done, that they were required to do it, that it was additional work, that is right in here,

(Testimony of William H. Griffin.)

have gone through that and approved by the Court.

The Court: Why——

Mr. Cline: I am saying I object to this, already covered by our pre-trial order.

The Court: If that be true there is nothing left to be done.

Mr. Hogan: Very well, your Honor. You may step down. Respondent rests.

Mr. Cline: And the libelant rests, your Honor.

The Court: What is it?

Mr. Cline: Libelant rests. [90]

The Court: Take a recess.

(Short recess.)

Mr. Cline: May it please the Court, I am not unmindful of the fact that we rested. I wonder if the Court would grant me the indulgence of asking a couple of questions on further cross-examination of the witness, Mr. Ames?

The Court: You may.

Mr. Cline: Mr. Ames, will you take the stand, please?

RAYMOND R. AMES

recalled for further cross-examination, having been previously sworn, testified further as follows:

Further Cross-Examination

By Mr. Cline:

Q. Mr. Ames, how did you define your particular —your title of your office?

A. Head planner and estimator.

(Testimony of Raymond R. Ames.)

Q. Yes, that's it. And you were such in October and November, 1950—September, 1950?

A. Yes.

Q. And there are a number of other planners, or planners under you in the office?

A. At that time there was approximately 15.

Q. 15. Now, was there—was it your province to go out on the job and inspect boats and so on?

A. No, sir. [91]

Q. Your work was in the office?

A. That's correct.

Q. You never did see these lifeboats at the time until after the work was undertaken, did you?

A. Never did see them, no.

Q. As a matter of fact, you didn't write the specifications that are introduced in evidence as Respondent's Exhibit A, (Respondent's Exhibit No. 2, Pre-trial Order.) did you?

A. I perused them, I did not write them.

Q. Then your testimony that you gave on direct examination that you wrote these specifications was not correct, was it?

Mr. Hogan: I object, your Honor. He didn't testify to that effect at all.

The Court: He may answer.

Mr. Hogan: The specifications were drawn under his supervision.

Mr. Cline: He said that he wrote, it was his intent when he wrote them on——

Mr. Hogan: He did not so testify.

Mr. Cline: I beg your pardon, your Honor——

(Testimony of Raymond R. Ames.)

Mr. Hogan: It is twisting——

The Court: Did you testify to that?

The Witness: Yes, sir.

The Court: That is sufficient for all purposes, if that be the fact. [92]

Q. (By Mr. Cline): These specifications were drawn by planner Dalzell, isn't that right?

A. That is correct, he is a planner and estimator, he worked for me.

Q. You never saw these plans or these specifications until after this controversy arose, did you?

A. I never saw the specifications?

Q. These particular specifications.

A. I perused those specifications before they were issued, that was my job.

Q. But they had already been prepared, is that right?

A. They had been written in longhand and I perused them and passed on them.

Mr. Cline: That is all.

Redirect Examination

By Mr. Hogan:

Q. You knew what was intended by those specifications, didn't you? A. Yes, sir.

Q. That is part of your job, isn't that right?

A. That is correct.

Mr. Hogan: That is all.

Mr. Cline: The libelant rests.

Mr. Hogan: That is all.

(Witness excused.)

Certificate of Reporter

I (We), Official Reporter(s) pro tem, certify that the foregoing transcript of 93 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ ELDON M. RUTH,

/s/ P. D. NORTON.

[Endorsed]: Filed May 16, 1954. [93]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys herein:

Libel.

Answer.

Request for admission of facts and genuineness of documents under Rule 32B, Supreme Court Admiralty Rules.

Admission of genuineness of documents.

Motion to dismiss.

Pre-trial Order.

Request for admission of genuineness of documents under Rule 32B, Supreme Court Admiralty Rules.

Admission of genuineness of documents.

Order reserving ruling on motion to dismiss.

Stipulation re value of materials and labor.

Order for entry of judgment.

Final decree.

Findings of fact and conclusions of law.

Notice of motion to amend findings of fact, pursuant to rule 52(b).

Notice of motion for new trial, pursuant to Rule 59.

Motion to modify decree.

Order denying motions for new trial and to amend findings.

Modified final decree.

Notice of appeal.

Statement of points appellant intends to rely upon on appeal.

Cost bond on appeal.

Designation of documents to be contained in the record on appeal.

Respondent's supplemental designation of record on appeal.

Reporter's transcript, Dec. 16, 1953, of opening statements.

Reporter's transcript, Dec. 16, 1953, of trial.

Joint exhibits 1 and 2 attached to answer.

Joint exhibit 3 attached to request for admission of facts.

Joint exhibit 4.
Respondent's exhibits A to C, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of June, 1954.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy.

[Endorsed]: No. 14389. United States Court of Appeals for the Ninth Circuit. Triple "A" Machine Shop, Inc., a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 11, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

In Admiralty No. 14389

TRIPLE "A" MACHINE SHOP, INC.,

Libelant and Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent and Appellee.

NOTICE TO CLERK RE APPELLANT'S POINTS ON APPEAL

To the Clerk of the Court above named:

You are hereby respectfully informed that the appellant above named relies and bases its appeal upon the same points set forth in its "Statement of Points Appellant Intends to Rely Upon on Appeal" filed in the above-entitled action in the United States District Court on May 7, 1954, and the same may be used as appellant's points on appeal herein.

Dated: June 17, 1954.

/s/ J. THADDEUS CLINE,
Proctor for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 17, 1954.

No. 14,389

IN THE

United States Court of Appeals

For the Ninth Circuit

TRIPLE "A" MACHINE SHOP, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

J. THADDEUS CLINE,
732 Monadnock Building, San Francisco 5, California,
Proctor for Libelant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,389

IN THE

United States Court of Appeals

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UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

EXPLANATORY STATEMENT RELATIVE TO THE DESIGNATION OF THE EXHIBITS IN EVIDENCE.

It will be noted that in the printed Transcript of Record, almost all of the exhibits are designated by more than one number or letter. This somewhat unusual practice arose in the following manner.

In the pre-trial proceedings that were had in the Court below, all but one or two of the exhibits appearing in the Transcript were set forth in the Pre-Trial Order under the heading "Pre-Trial Exhibits" (Tr. p. 74). Before trial it was agreed between counsel for both parties that all of the said pre-trial exhibits would be introduced in evidence at the trial as joint exhibits and bear the same numbers as were used in the said pre-trial order.

Although this procedure was approved by the Trial Court, the said parties were later met with the Court's demand, which made it necessary to introduce certain documents individually. In order to avoid confusion herein, the printed transcript designates the said exhibits not only by the numbers used in the pre-trial order, but, also, the number or letters applied to the said documents when introduced in evidence or discussed during the trial in the Court below.

STATEMENT UNDER RULE 18-2(b) RE JURISDICTION OF THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS.

While the libel in the above entitled action contains three causes of action, Libelant filed an acknowledgment of full satisfaction of the amounts claimed in its first and second causes of action. In so far as the trial and this appeal are concerned, Libelant's action is based solely upon its third cause of action.

The said third cause of action is for the reasonable value of the labor and materials furnished by Libelant in making certain repairs on five lifeboats owned by Respondent.

Claims for repairs of government-owned vessels come within the admiralty jurisdiction of the United States District Court.

Title 46; Section 971;

Title 46; Sections 742 and 743;

Title 28; Section 1333;
Admiralty Rule 13.

The United States Court of Appeals has jurisdiction of all appeals from final decisions of the United States District Court.

Title 28; Section 1291.

STATEMENT OF THE CASE AND GENERAL STATEMENT OF THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

I. Did Libelant's bid to make lifeboat repairs, when accepted by Respondent, constitute the contract between the parties?

II. Can the findings of fact be sustained, in that the findings:

a. Omit material evidence;

b. Are contrary to the evidence;

c. Contain legal conclusions.

III. Can the conclusions of law be sustained, in that the conclusions:

a. Are contrary to law;

b. Are based upon unsupported findings of fact.

IV. Did the Court err in denying Libelant's motion to amend Findings of Fact and Conclusions of Law and motion for new trial?

V. Are the order for judgment, conclusions of law, final decree, and the final decree as modified contrary

to law and the evidence, and at variance one with the other?

For the purpose of clarity and uniformity, Triple "A" Machine Shop, Inc., libelant and appellant herein, will be referred to herein as Libelant, and the United States of America, respondent and appellee herein will be herein referred to as Respondent.

Libelant is a San Francisco firm, engaged solely in ship repair work. In order to be eligible to bid on government ship repair work, Libelant, along with all other contractors, was required to and did sign a Master Contract (Joint Ex. 1, Tr. p. 25) in February 1950. The said master contract set forth general provisions covering the rights and duties of the respective parties as to any repair jobs that might thereafter be awarded to Libelant.

Subsequent to the execution of said Master Contract, Respondent circulated among the qualified contractors an Invitation to Bid (Joint Ex. 3, Tr. p. 51), whereby bids were solicited for the repair of five lifeboats. The said invitation was accompanied by a set of specifications (Joint Ex. 2, Tr. p. 34) covering said repair job. The said specifications are in two parts, the first two pages being in the nature of a

preamble setting forth general provisions relative to the job and a statement that it is intended that the said lifeboats shall be put in complete repair and in first-class operating condition. The second part of said specifications is under the heading of *"Category A Items"* under which the specific items of repairs for each lifeboat are set forth in detail. These items were prepared by the government planner after he had checked over the lifeboats to determine what repairs were needed.

In government ship repair work *"Category A Items"* are understood and intended to mean the repairs which the contractor will definitely be required to make. These items of repair are explicitly set forth under the heading *"Category A Items."* On the other hand, Category B and Category C items are those items of repair that are uncertain, or unknown, or that the contractor may not be required to perform.

Along with said Invitation to Bid, Libelant was furnished with a printed form of bid to be used by Libelant in submitting its bid for said repair job. The said form was prepared for submission of a bid to furnish said *"Category A Items"* which were explicitly listed in the said specifications, as aforesaid. The said bid form was also prepared for the submission of a bid for "Category B Items" and "Category C Items."

The said lifeboats were so constructed that the metal floors, floor boards and buoyancy tanks concealed most of their interior. Whether or not repairs beyond those specified in said *"Category A Items"*

would be required could not be determined until after the said floors and tanks had been torn out and an inspection had been made by the Coast Guard inspector. For this reason, Libelant submitted its bid to furnish *"Category A Items"* only.

Libelant was low bidder and its said bid to furnish *"Category A Items"* only was accepted by Respondent without question or qualification. Libelant promptly proceeded with its contract to furnish and install all of the repairs specified in its said bid, namely, the repairs listed and described in the specifications under the heading *"Category A Items."* After the floors and tanks were torn out, Respondent's inspector determined that other and additional repairs were necessary to put said lifeboats in proper condition. It was found that the old tanks had deteriorated and required replacement. The replacement of the tanks was accomplished on a field order at the agreed price of $9,490.00. This extra repair work was the basis of Libelant's second cause of action, which has been paid in full and is not now an issue in this case.

The inspector found other and additional repairs that he deemed necessary to put the said lifeboats in proper condition. Respondent thereupon demanded that Libelant furnish and install said additional repairs without compensation therefor. Under said Master Contract, Respondent had the right to require Libelant to install repairs that were not included in its bid, and Libelant had no right to hold up the job pending settlement of the amount to be

paid for such additional repairs. Libelant therefore proceeded to furnish and install said extra repairs, but did so under express notice to Respondent that Libelant would require payment of the reasonable value of said extras.

The said extra work was of the reasonable value of $6,342.00. No part of said extra repair work is included in the *"Category A Items"* in said specifications. Respondent has refused to pay the said reasonable value of said extra repair work or any part thereof.

Before filing the above entitled action, Libelant pursued and exhausted its administrative remedies provided in said Master Contract. Thereafter Libelant filed its libel herein in which the third cause of action is for the said reasonable value of said additional repairs, namely, $6,342.00.

Thereafter Libelant filed herein an acknowledgment of full payment of the amounts claimed in its first two causes of action, leaving its third cause of action as the only matter in controversy before the Court. Subsequently the parties by stipulation agreed that the said additional repairs were of the reasonable value of $6,040.00.

Pre-trial procedure was followed in this case. All material facts were agreed to by the parties, and the same were incorporated in and adopted by the Court in its Pre-Trial Order. Thereafter the action went to trial on the third cause of action on one principal question of law, namely:

1. Did Libelant's bid, when accepted by Respondent, constitute the contract of the parties?

a. If the contract arose out of Respondent's acceptance of Libelant's offer to furnish *"Category A Items"* for the contract price of $3,775.00, how did Libelant become legally charged with the duty of furnishing subsequently discovered *"Category B Items"* of the value of $6,040.00 without compensation therefor?

Prior to the trial Respondent filed a motion to dismiss the above entitled action on the ground that the decision of the administrative appeal board was final and conclusive. The said motion was argued and briefed, and thereafter the Court (Judge Louis E. Goodman) made its written order reserving a ruling on said motion until after the trial. Final decision on said motion was reserved on the ground that the Court did not have before it sufficient facts to determine whether the controversy between the parties arose out of the said plans and specifications. The Court clearly indicated, however, that the motion to dismiss would have to be denied if the evidence introduced at the trial established that said controversy was one that came within the provisions of Article 5 (J) of said Master Contract. This was by reason of the fact that said Article 5 (J) does not provide that decisions made thereunder are final or conclusive.

At the conclusion of the trial the Court made its Order for Entry of Judgment in favor of Respond-

ent. The trial Court appears to have adopted and followed the reason expressed in Judge Goodman's said order, in that the trial Court did not dismiss the action, but to the contrary, rendered judgment in favor of Respondent. The said order for judgment in favor of Respondent raises Libelant's next point on appeal, namely, *that said order for judgment is contrary to law, and is not supported by substantial evidence.*

Thereafter the Court made its Findings of Fact and Conclusions of Law, which give rise to Libelant's second principal question on appeal, namely:

I. The Findings of Fact are contrary to law and the evidence.

A. The Findings of Fact (Tr. p. 93) not only contain conclusions of law, but what is more serious, the said conclusions of law are erroneous.

1. Finding VII contains the erroneous conclusions of law that by its bid Libelant did "offer and agree . . . to completely repair and recondition, both mechanically and structurally, the five (5) lifeboats specified in the Invitation to Bid No. P 51-36 and Specification No. MSTSP 51-64 at a total price of $3,775.00 . . ."

2. Finding XI contains the erroneous conclusions of law that the additional repairs which Libelant was required to furnish "did not comprise extra work to be performed by the libelant".

B. The Findings of Fact are not supported by the evidence.

1. Finding VI is not only not supported by the evidence, but the evidence is directly to the contrary.

2. The last two and one-half lines of Finding VII are directly contrary to the evidence, viz., that Libelant's said "bid was submitted on a basis of computations as to work needed to be done . . ."

3. That the statement contained in Finding XI is contrary to the evidence, viz., "that all such items of repair were visible and subject to inspection and ascertainment by libelant's representative prior to submission of libelant's bid."

C. That the Findings of Fact omit essential facts established by the evidence and the Pre-Trial Order.

1. Finding V quotes only selected portions of the preamble of the specifications and omits the only portion of the specifications that was included and referred to in Libelant's said bid, namely, the *"Category A Items"*, which constituted the last three pages of said specifications.

2. That the Findings omit all or the essential portions of the "Agreed Facts" as approved by the parties and adopted by the Court in its Pre-Trial Order. That more particularly the Findings of Fact omit the following material facts established in this case by the said Pre-Trial Order, (Tr. p. 68) namely, (quoting from the Agreed Facts set forth in the said Pre-Trial Order):

> "7. That on September 29, 1950 in response to Invitation to Bid No. P 51-36, Triple 'A' Machine Shop, Inc., libelant herein, sub-

mitted its bid for repairs to five lifeboats for a total price of $3,775.00."

"8. That on October 2, 1950, Military Sea Transportation Service Pacific accepted the bid of Triple 'A' Machine Shop and issued 'Job Order No. 10' under Master Contract MST-235 to Triple 'A' Machine Shop, libelant herein, authorizing commencement of repairs to five lifeboats in accordance with Specifications for Repairs No. MSTSP 51-64."

"12. That during the months of October and November 1950 *libelant was required* by Military Sea Transportation Service Pacific *to perform additional work* and furnish labor and materials to effect certain repairs to the said lifeboats."

"13. That although claim has been made by Triple 'A' Machine Shop. libelant herein, against the respondent United States of America, for the 'reasonable value' of the said work performed in the alleged amount of $6,342.00 as set forth in libelant's Third Cause of Action, such sum has not been paid and respondent ('libelant' corrected to 'respondent' by the Court) has failed and refuses to pay said sum."

"14. That in October 1950 Triple 'A' Machine Shop, libelant herein, was required to perform the *aforesaid additional work* on the said five lifeboats and libelant was advised by the Contracting Officer, Military Sea Transportation Service Pacific, that *such additional work* was covered under the Specifications for Repairs No. MSTSP 51-64, Job Order No. 10 and Master Ship Repair Contract MST-235. That libelant proceeded with said work under written protest

and notice to the Contracting Officer that Libelant would require payment of the reasonable value of *said additional work.*"

"17. That the claim of Triple 'A' Machine Shop, libelant herein, for payment for the *additional work* performed on the five lifeboats was appealed to the Contract Advisory Board, Military Sea Transportation Service, by libelant under and pursuant to Article 5(j) and Article 14 of said Master Contract No. 235."

"18. That the Contract Advisory Board, Military Sea Transportation Service, declined to consider said appeal under Article 14, but determined under Article 5(j) of the Master Ship Repair Contract MST-235 that the Specifications for Repair No. MSTSP 51-64 and Job Order No. 10 covered in full any and all work which libelant had been required to perform in repairing the said lifeboats, and that libelant accordingly was not entitled to reimbursement for said *additional work.*"

II. *The Conclusions of Law (Tr. p. 102) are contrary to law.*

A. Conclusion No. 1 is contrary to the established rules of law as to what constitutes a contract.

B. Conclusion No. 2 is contrary to law in holding that an administrative determination made pursuant to Article 5(j) of said Master Contract is conclusive on the parties.

C. Conclusion No. 3 is contrary to law in holding that an administrative determination made pursuant

to Article 5(j) of said Master Contract is conclusive and binding on the Court.

D. Conclusion No. 4 is contrary to law and the evidence.

E. The order for judgment in favor of Respondent, with which the Court ends its said Conclusions of Law, is directly opposed to its said conclusions Nos. 2 and 3, in that if said conclusions were legally sound the Court would not have had jurisdiction to grant judgment or make any order other than an order granting Respondent's said motion to dismiss.

On signing said Findings of Fact and Conclusions of Law the Court made and entered its "Final Decree" dated March 10, 1954. This raises Libelant's next point on appeal, namely:

III. *The said "Final Decree" is directly at variance with the Court's said "Order for Entry of Judgment",* in that the said order directed judgment in favor of the Respondent, whereas said "Final Decree" ordered the action dismissed.

Thereafter and within the statutory period, Libelant filed a motion to amend the Findings of Fact and Conclusions of Law, and also a motion for new trial. The said motions were duly argued and taken under submission. Thereafter and before the Court had ruled on said motions, Respondent filed a motion to modify said Final Decree so as to change the same from an order dismissing said action to a judgment in favor of Respondent. Thereafter, the Court made

an order denying Libelant's said motion to amend the Findings of Fact and Conclusions of Law and said motion for new trial. The Court thereupon made a further order granting Respondent's said motion to modify said Final Decree. This raises Libelant's final questions on appeal:

IV. The Court was in error in denying Libelant's motion to amend the Findings of Fact and Conclusions of Law (Tr. p. 104).

V. The Court was in error in denying Libelant's motion for new trial (Tr. p. 105).

VI. The Final Decree (Tr. p. 108), as amended, is contrary to law and not supported by the evidence.

VII. The Final Decree, as amended, is at variance with the Conclusions of Law.

ARGUMENT.

This action went to trial on the third cause of action, wherein Libelant seeks judgment in the sum of $6,342.00 as the reasonable value of certain lifeboat repairs furnished by Libelant, which said repairs were in addition to the repairs specified in its

bid. The said extra repairs which are the subject matter of said third cause of action, and the reasonable value thereof, are as follows: (Exhibit A, Tr. p. 80):

"298 sq. ft. shell plate	$3,600.00
All floors in 4 lifeboats	1,000.00
Approx. 270 sq. ft. #1 lumber for margin boards	352.00
2 Hand gear propelling sockets	90.00
All galvanized iron tank straps	200.00
All aluminum tank straps	50.00
Thwarts (2 renewed)	150.00
Life lines and floats on boats	225.00
116 ft. Splash railing	140.00
24 hanging clips for splash railing	70.00
24 sockets for splash railing	70.00
Renewed 2 plates and 2 doublers which specifications called for fairing and same were found cracked	395.00
Total	$6,432.00"

At the commencement of the trial the parties stipulated that the reasonable value of the aforesaid repairs is $6,040.00 (Tr. p. 89). The said sum is therefore the amount for which Libelant seeks judgment.

The action went to trial with all material facts having been agreed upon by the parties and adopted by the Court in its Pre-Trial Order. The case raised only one question of law to be determined by the Court, namely, what constituted the contract of the parties? It is obvious that Libelant would not be

entitled to judgment for the reasonable value of the above listed repairs if, under its contract, Libelant was bound to furnish said extra repairs without any additional compensation therefor.

Since the trial Court has erroneously ruled that the said additional repairs were within the obligation of Libelant's contract, we must refer back to the elementary rules of contract law as to what constitutes a contract and as to how a contract comes into being.

Civil Code, Section 1549.

"A contract is an agreement to do or not to do a certain thing."

Civil Code, Section 1639.

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."

12 *Cal. Jur.* (2d), p. 208.

". . . Each party has a right to rely on the acceptance as constituting a contract. The party making the offer has a right to understand that the acceptance was according to the terms of the offer, and an acceptance so made cannot be held to have a binding force beyond the terms of the offer."

12 *Cal. Jur.* (2d), p. 216.

". . . Therefore, in order for a proposal and acceptance to constitute a binding contract, the proposal must be squarely assented to. The ac-

ceptance must in every respect correspond with the offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they are stated."

12 *Cal. Jur.* (2d), Section 25, p. 202.

". . . There must be an offer or proposal and an acceptance of it. Through such offer by one of the parties and acceptance by the other a contract between them is created."

To constitute a contract the offer would have to be accepted without the slightest change or modification.

Sackett v. Starr, 95 C.A. (2d) 128.

P. 133 "... Mutual consent is necessary to the existence of any contract, and *one cannot be made to stand on a contract to which he never consented.* (Cummings v. Ross, 90 Cal. 68 (27 P. 62).) There can be no contract unless the minds of the parties have met and mutually agreed. (Marx & Tawolle v. Standard Soap Co., 42 Cal. App. 32 (183 P. 225); Los Angeles etc. Co-operative Assn. v. Phillips, 56 Cal. 539; 6 Cal. Jur. Sect. 24, p. 43.) There *must be an offer* or proposal *and an acceptance* of the same."

Corbin on Contracts, V. 1, p. 259.

"A communicated offer creates a power to accept the offer that is made, *and only that offer.*"

17 *Corpus Juris Secundum,* p. 370.

"One who makes an offer to enter into a contract may do so *on any terms that he may see fit* to make, as long as they are not illegal; and,

if the offer is accepted, such terms are binding on both parties."

In applying the foregoing rules of contract law to this case, it will be necessary to briefly review the material facts.

The general dealings between Libelant and Respondent commenced with their signing a Master Contract wherein the general practice and procedure is established for all contractors engaging in government ship repair work.

This particular transaction was initiated by Respondent submitting to Libelant and other contractors an Invitation to Bid (Joint Ex. 3, Tr. p. 51) to furnish repairs for five lifeboats. The said Invitation to Bid was accompanied by a set of specifications (Ex. 3, p. 36). The first two pages of said specifications contained general provisions relative to the job and a statement that it was intended that the lifeboats were to be put into first-class condition. The following three pages, under the heading *"Category A Items,"* listed the specific repairs to be made to each of said lifeboats.

In Naval ship repair work *"Category A Items"* are the known repairs that will definitely have to be made, whereas "Category *B* Items" and "Category *C* Items" are the repairs for unknown or as yet undiscovered defects, or repairs that may or may not be required (Tr. p. 131-132; 186). Presumably, Respondent's surveyor, who inspected the lifeboats and

prepared the specifications, listed under *"Category A Items"* all defects and necessary repairs that were known or reasonably ascertainable from an inspection of the lifeboats. Otherwise, the failure to list repairs that were known to be necessary would amount to a positive fraud on the part of Respondent.

After receiving said Invitation to Bid and a copy of said specifications, Libelant inspected the lifeboats but only in reference to said *"Category A Items"* (Tr. p. 128-129). It is obvious that the said contractor did not care to speculate or gamble on what the Coast Guard Inspector might require after the built-in buoyancy tanks, steel floors and wooden flooring were torn out.

In any event, after inspecting the said lifeboats, Libelant determined that it would reasonably cost $3,775.00 to furnish and install the *"Category A Items"* of repair (Tr. p. 170). Libelant thereupon submitted its bid on the form provided by Respondent, and offered to furnish and install *"Category A Items"* only for the said price of $3,775.00 (Ex. H, Tr. p. 58). In this connection, Libelant's said bid expressly states:

> "Triple A Machine Shop, Inc. . . . offers and agrees, if this bid is accepted . . . to furnish any and all of the items of supplies or services *described on the reverse side of this bid at the price set opposite each item."*

And Libelant's bid, as set forth on the reverse side thereof, expressly states:

"*Category A Items*
Repair to five (5) lifeboats.
Total price $3,775.00
Category B Items

Item No.	*Price*	*Item No.*	*Price*

"

(Under Category B Items, spaces are provided for 34 items and price for each. These are all blank in Libelant's bid.)

Libelant submitted its said bid, and the same was accepted by Respondent without any question or qualification (Tr. p. 171). Thereafter, Libelant proceeded to install the "*Category A Items*" of repairs in accordance with its accepted bid (Tr. p. 171). During the course of the job and after the tanks and floors had been removed, Respondent's inspector determined that other repairs would be required to put the said lifeboats in proper condition (Agreed Facts, Tr. p. 70).

Since this newly discovered repair work (*Category B Items*) was not covered by the terms of Libelant's accepted bid, Respondent could have had this extra work performed in its own yards, or could have called for bids for said extra work, or it could require Libelant to furnish said extra repairs. Under Article 14 of said Master Contract, (Joint Ex. A, Tr. p. 25), Respondent could require Libelant to furnish and install the extra repairs that were not covered by its contract. In such event, the contractor has no right to hold up the job pending agreement as to the reasonable value of said extras.

Respondent chose this latter course and required Libelant to furnish said additional repairs hereinabove listed. Libelant did so, however, under the express notice to Respondent that Libelant would require payment of the reasonable value thereof. As noted above, it has been stipulated that the reasonable value of said additional repairs is $6,040.00, (Tr. p. 89), and that no part thereof has been paid (Agreed Facts, Tr. p. 68).

Libelant is in accord with Respondent's intent as expressed in the preamble pages of its said specifications, namely, that said lifeboats should be put in proper condition before being returned to service. But there was no expressed intent, and certainly no actual intent, that the contractor would be required to *gratuitously* furnish $6,040.00 worth of repairs that were not listed or mentioned in its bid, and which were not even discovered until long after Libelant's bid had been unqualifiedly accepted by Respondent (Tr. p. 179-180-182).

(Tr. p. 171):

"Q. (Mr. Cline) And when you returned your bid to the Military Sea Transportation Service—. You returned your bid to the Military Sea Transportation Service, did you?

A. (Mr. Blake) That is right, sir.

Q. And you were generally notified that it was accepted?

A. Yes, sir.

Q. Now was there any question raised by the Military Sea Transportation Service as to the

fact that your bid specifically on its face showed it covered only category 'A' items?
A. As specified, that is right, sir.
Q. Well, I say, was there any question raised by them as to your bid having—
A. No, sir—no, sir, they accepted our bid under category 'A', and the boats were put in our custody and we proceeded with repairs under category 'A', and they tried to throw in these additional repairs."

In brief, we must get down to the elementary questions of contract law as to whether an offer and acceptance constitutes the contract of the parties. It would seem that there could be no dispute as to this point. However, the decision of the Court below seems to have been based upon the false conclusion that Respondent's "Invitation to Bid" (Joint Ex. 3, p. 51) constituted the offer, and that Libelant's Bid (Joint Ex. 4, p. 58) constituted an acceptance of such offer. Obviously, the Invitation to Bid is not an offer, but is only a request for offers.

Corbin on Contracts, V. 1, p. 58 (1950):
"Frequently the same situation exists in the case of advertisements for bids on some building or other construction, public or private, or on the furnishing of supplies. *The advertisement is not an offer. It is a request for offers.*"

12 *Am. Jur.,* 526:
". . . A general offer must be *distinguished from a general invitation to make an offer.* Performance of the conditions of the former makes a

> legally binding contract, whereas compliance with the requirements of the latter involves nothing more than an offer, which may or may not be accepted by the party who issued the invitation therefor."

Likewise, the specifications (Ex. C, Tr. p. 36) do not constitute an offer. To the contrary, the specification is a factual statement of Respondent's intent, together with certain procedural matters, and a list of specific repairs that are known to be necessary, viz. *"Category A Items."* It was possible, however, for a bidder to incorporate all or any part of the specifications in its bid. For instance, a bidder could have made an offer to furnish all repairs known to be necessary or that might thereafter be discovered. Or a contractor could have submitted an offer to furnish certain specific repairs listed in said specifications. The latter is exactly what Libelant did. By its bid, it incorporated into its offer the portion of the specifications therein expressly designated and only that portion, namely, *"Category A Items."* (Tr. p. 170-171; 179).

Respondent could have rejected Libelant's bid, but instead, it accepted Libelant's bid as submitted (Tr. p. 171). In this connection, it will be noted that Respondent's Invitation to Bid never contemplated that a bidder would submit an offer to furnish anything other than *"Category A Items."* Paragraph 8 of the Invitation reads:

> "The successful bidder will furnish to the Contracting Officer a breakdown of the total bid

showing the price for each item, *such breakdown to be furnished immediately after the issuance of a Job Order* to the successful bidder."

How could a bidder submit a breakdown of repairs that were not known or discovered until the job was in progress? (Viz., Category B Items.)

In determining that the said additional repairs were within the obligation of Libelant's contract, the trial Court not only departed from the law and sought to write a new contract for the parties, but the Court departed from the "Agreed Facts" of the case and the evidence.

In the Pre-Trial Order (Tr. p. 68) the parties agreed upon all material facts in the case and the same were adopted by the Court. The "Agreed Facts" set forth in said order are now established facts in this case. The said "Agreed Facts" definitely establish that the hereinabove listed additional repairs were not covered by Libelant's contract, but were in fact extra and additional repairs which Respondent required Libelant to furnish.

"Agreed Facts; Pre-Trial Order.

12. That during the months of October and November, 1950 *libelant was required* by Military Sea Transportation Service Pacific *to perform additional work* and furnish labor and materials to effect certain repairs to the said lifeboats.

14. That in October 1950 Triple 'A' Machine Shop, libelant herein, was required to perform the *aforesaid additional* work on the said five lifeboats and libelant was advised by the Con-

tracting Officer, Military Sea Transportation Service Pacific, that *such additional* work was covered under the Specifications for Repairs No. MSTSP 5164, Job Order No. 10 and Master Ship Repair Contract MST-235. That libelant proceeded with said work under written protest and notice to the Contracting Officer that libelant would require payment of the reasonable value of *said additional work.*"

Not only was it established before trial that the said repairs were in addition to the repairs covered by Libelant's contract, but the evidence introduced at the trial removes all possible doubt on the question.

Respondent's main witness, Mr. Ames, the person under whose charge the said specifications were prepared, admitted on cross-examination that not one of the said items of additional repairs was listed in said "Category A Items" (Tr. p. 193-194):

"Q. (Mr. Cline) Now, you have read, have you, all of category A from the specifications?

A. (Mr. Ames) I have read pages 4 and 5.

Q. That is right, you read entirely all of the document, did you, from the place where it is headed category A items, you read all of them thereon, did you?

A. That's right.

Q. And nowhere in there is — withdraw that. And the categories you have just read covered by designation the five boats that are involved in this lawsuit, is that right?

A. Yes.

Q. And nowhere in that Category A is there one of these items that you referred to and that

are referred to in this letter, Exhibit D, as being the items of extra work claimed by Triple A?
A. Those items there are referred to in the other pages.
Q. But not category A, are they?
A. Not as so designated.
Q. That's right."
* * * * * * *

(Tr. p. 197):

"Q. (Mr. Cline) That's right. There is no question, Mr. Ames, as to a desire on your part to have the boats put in shape. But what I am asking you if it is not a fact that there is not one word in the specifications that says that if any extra work develops during the course of the job, that that will be part of category A?
A. (Mr. Ames) No, there is no mention of that."

Not only does Libelant's bid clearly state that it only covered *"Category A Items"* but Respondent's witness admitted, on cross-examination, that Respondent accepted the said bid on that basis.

(Tr. p. 190):

"Q. (Mr. Cline) Now, Mr. Ames, you will refer to this Exhibit 4 (Libelant's bid) and show me where there is a bid for anything other than the items involved in Category A?
A. (Mr. Ames) There are none.
Q. In other words, this bid expressly states—starts with a heading category A, repair five lifeboats, total $3,775?
A. That's right.

Q. And this bid for $3,775 for category A was accepted by the Government, is that right?
A. By the contract section, yes."

Under the rules of law hereinabove set forth, a legal contract came into being on Respondent's acceptance of Libelant's bid. The terms of that contract are established by the terms of the offer. And the same cannot be varied or enlarged by either the Respondent or the trial Court. It, therefore, clearly appears that the trial Court was in error in holding that Libelant was legally bound under the obligation of its contract to gratuitously furnish $6,040.00 worth of repairs in addition to the repairs specified in its bid.

The only other question that was before the trial Court was a question of fact, namely, "Did the controversy between the parties arise out of the plans and specifications?"

This question was raised by Respondent before trial on a motion to dismiss. The said motion was based on the contention that a prior determination by an administrative board was final and conclusive,

and that the Court is without jurisdiction to consider and determine said controversy. The trial Court ruled on this motion in its Findings of Fact and Conclusions of Law (Tr. p. 93), wherein the Court held that the prior administrative ruling was final and conclusive. We respectfully urge that the Court was in error.

To consider this question it will be necessary to briefly refer to the facts as established by the Pre-Trial Order (Tr. p. 68) and the record.

As noted above, Respondent's inspector discovered during the course of the repair job that additional repairs were necessary to put the lifeboats in proper condition. Respondent thereupon required Libelant to furnish said additional repairs as it had a right to do under said Master Contract. Libelant furnished the said extra repairs under notice that it would demand payment of the reasonable value thereof.

At the conclusion of the job, Libelant billed Respondent for the said reasonable value of said additional work. Respondent's local contracting officer rejected the said bill on the ground that Libelant was obliged under its contract to furnish said additional repairs without compensation therefor.

Libelant then gave notice of appeal under Article 14 and Article 5(j) of the said Master Contract. Respondent thereupon designated its Contract Advisory Board in Washington, D. C., as the Agency to hear and determine said appeal. The said appeal board

thereafter made its ruling (Ex. I, Tr. p. 60) under which it made two determinations, namely:

1. That the controversy arose out of the specifications, and therefore Libelant's appeal could only be considered under said Article 5(j) of the said Master Contract.

2. That in determining said appeal under Article 5(j) the board ruled that the specifications "as bid upon by the contractor" included all repairs furnished by Libelant, and that therefore Libelant was not entitled to compensation for the said additional repairs.

After receipt of said administrative ruling, Libelant filed the above entitled action. Shortly before trial, Respondent filed a motion to dismiss, (Tr. p. 67), as aforesaid, and the said motion was argued, briefed, and submitted before Judge Louis E. Goodman. Thereafter, Judge Goodman filed his written opinion (Tr. p. 87) under the terms of which he determined:

1. That, while the Master Contract provides that administrative decisions under Article 14 are final and conclusive, the said contract does *not* provide that decisions under Article 5(j) are final or conclusive.

2. That Article 5(j) applies to "any questions regarding or arising out of the interpretation of plans and specifications."

3. That on said motion to dismiss, the Court did not have sufficient facts before it to determine whether

the controversy was one that would come under Article 5(j), and that therefore the ruling on said motion to dismiss was reserved until the trial.

There was therefore reserved for the trial Court's determination the question of fact as to whether the controversy presented a question regarding or arising out of the plans and specifications.

There would seem to be no room for doubt as to this question. Respondent's local contracting officer decided that the controversy arose out of the specifications, and, hence, Article 5(j) applied (Ex. B. Tr. p. 84). The same determination was made by said appeal board, (Ex. I, Tr. p. 60), and the trial Court likewise made the same determination in its Findings of Fact and Conclusions of Law (Tr. p. 93). The trial Court should therefore have denied said motion to dismiss; and its said conclusion of law that the said decision of the administrative board was final and conclusive was in error.

The provisions of Article 5(j) of the Master Contract (Joint Ex. I, p. 25) are clear and without ambiguity. As stated in Judge Goodman's said Opinion, "Article 5(j) does *not* specify that the Commander's decision shall be final and conclusive." Certainly, the Court had no power to write into the said provisions of the Master Contract language which would deny to the contractor his constitutional right of redress in Court. While a person may by contract waive his right to judicial review or redress in Court, such

waiver cannot be presumed, or read into a contract that is silent on the subject.

The Penker Construction Co. v. U.S., 96 Ct. Cl. Reports 1, p. 37:

> "It is well settled that provisions preventing resort to the courts to settle the rights of the parties are to be strictly construed against excluding this right. This remedy will not be denied *unless the language of the contract makes such a conclusion inescapable.* Mercantile Trust Co. v. Hensey, 205 U.S. 298; Central Trust Co. v. Louisville, St. Louis & T. R. Co., 70 Fed. 282; Zimmerman v. Marymor, et al., 290 Pa. 299; and other cases cited in 54 A.L.R., 1255."

It is, therefore, respectfully urged that the trial Court's Findings of Fact and Conclusions of Law, on which it based its judgment, are in error in holding that the determination of the administrative board is final and is conclusive on Libelant and the Court alike.

It would seem that we need go no further! If the trial Court had jurisdiction to render a judgment,

and if the extent of Libelant's contractual obligation was established by the terms of its written offer as accepted by Respondent, then it would appear that a reversal is mandatory.

The other specifications of error hereinabove noted are likewise serious and vital. Although we feel that the trial Court should be reversed for its erroneous determination that Libelant's contractual obligation included repairs that were expressly excluded from its offer, we will nevertheless briefly refer to other errors hereinabove noted. To do otherwise might be misconstrued as a waiver of said points.

FINDINGS OF FACT.

We therefore turn to a consideration of the Findings of Fact (Tr. p. 93) and the Court's error in:

1. Omitting essential established facts.
2. Establishing "facts" that are either contrary to or not supported by the evidence.
3. Setting forth conclusions of law as "facts."

As noted above, pre-trial procedure was followed in this case. The Pre-Trial Order (Tr. p. 68) sets forth all of the material facts of this case under the heading of "Agreed Facts". This document was signed and approved by counsel for both parties and was thereupon signed and filed by the Court.

Respondent's counsel prepared the said Pre-Trial Order, including said "Agreed Facts". It therefore

cannot be claimed that Respondent was not familiar with the same. Respondent likewise prepared the Findings of Fact that were signed by the trial Court. It will be noted, however, that in preparing said Findings, material and essential facts established by the Pre-Trial Order were omitted. We refer to Paragraphs Nos. 7, 8, 12, 13, 14, 17, and 18 of the "Agreed Facts" set forth in said Pre-Trial Order, said paragraphs having been hereinabove quoted in full. The said facts having been approved by the parties and adopted by the Court are now established facts in the case, and cannot be ignored or omitted from the Findings of Fact by the trial Court. To hold otherwise would be to make a mockery of all pre-trial procedure.

The erroneously omitted facts establish in substance:

1. That Libelant submitted its bid for repairs to five lifeboats for a total price of $3,775.00.

2. That Respondent accepted Libelant's said bid.

3. That Respondent required Libelant to furnish additional repairs.

4. That said additional repairs are the subject matter of Libelant's third cause of action, and for which Libelant is asking judgment in the sum of $6,342.00 as the reasonable value thereof.

5. That Respondent contended that the said additional repairs were covered by Libelant's contract. That Libelant furnished said additional repairs under protest and on express notice that Libelant would re-

quire payment of the reasonable value of said additional repairs.

6. That on refusal of Respondent to pay for said extra work, Libelant filed an appeal under Article 5(j) and Article 14 of the Master Contract.

7. That Respondent's appeal board refused to consider Libelant's appeal under Article 14, but did accept and rule on the appeal under Article 5(j) and and did rule that the said extra repairs were covered by Libelant's contract.

Another prejudicial omission appears in the trial Court's Finding No. V, wherein certain selected portions of the preamble of the specifications are quoted, but there is a complete omission of the portion of the specifications entitled "Category A Items". This is the only part of the specifications that was referred to or incorporated in Libelant's bid. If any part of the specifications is to be included in the Findings, then the portion on which Libelant submitted a bid certainly should be included.

ERRONEOUS CONCLUSIONS OF LAW DESIGNATED AS "FACTS".

Finding of Fact VII is actually a conclusion of law. The Court there states that Libelant did "offer and agree . . . to completely repair and recondition . . . five lifeboats . . . at a total cost of $3,775.00 . . ." This legal conclusion is clearly erroneous.

The only testimony on the subject was from Libelant's witness Mr. Blake, who testified that in figuring the job and in submitting a bid only "Category A Items" were considered (Tr. p. 170-171; 179). The only other evidence on the subject, other than the "Agreed Facts" of the Pre-Trial Order, was the written bid itself. It certainly cannot be stated as a "fact" in the case or as a well-founded conclusion of law that Libelant's bid contains an offer to furnish any repairs other than "Category A Items".

Likewise, Finding No. XI is not a finding of fact but is an erroneous conclusion of law. The Court therein states that the repairs which Libelant was required to furnish "did not comprise extra work to be performed by the Libelant." There is no evidence on which the said statement may be based as a "fact". Nor can it be supported as a legal conclusion for the reason that the terms of an offer, when accepted, establish the terms of the contract, and the offer was to furnish "Category A Items" only. Furthermore, the said "Finding" is directly opposed to the "Agreed Facts" established in the case by the Pre-Trial Order (Tr. p. 68). In Paragraph No. 12 of said "Agreed Facts" and three times in Paragraph No. 14, the repairs here in question were referred to and established to be "additional work".

FINDINGS CONTRARY TO THE EVIDENCE.

Finding No. VI determines:

1. That Libelant "made a thorough inspection of the five lifeboats as to their condition and need for repairs" before submitting its bid.

2. "That all items requiring repair were visible and open to inspection by Libelant's agent."

The uncontradicted evidence is that Libelant's agent inspected the lifeboats only as to "Category A Items". There is not one word in the record that would sustain the Court's said statement that Libelant "made a thorough inspection of the five lifeboats as to their condition and need for repairs".

Likewise, the evidence is directly opposed to the Court's finding "that all items requiring repair were visible and open to inspection". The said finding is not only contrary to the evidence, but is also directly at variance with Finding No. X. The evidence established without conflict is that the built-in buoyancy tanks and steel floors and wooden floor boards made it impossible to see the condition of the interior of the boats. It was not until after the boats had been dismantled in Libelant's yard that an inspection could be made to ascertain whether there would be any repairs required other than "Category A Items". This is established by Finding No. X which is at variance with Finding No. VI.

Finding No. VII likewise is contrary to the evidence in that the said finding states that Libelant's "bid was submitted on a basis of computations as to

work needed to be done . . .'' Libelant's witness, Mr. Blake, was the one who made the estimate and submitted the bid on behalf of Libelant. He testified that he made an inspection only as to ''Category A Items'' and submitted a bid to furnish only ''Category A Items'' (Tr. p. 170-171). There is no other testimony or evidence on the subject. How could it have been otherwise? How could Libelant guess whether additional defects would be found when the floors and tanks were removed from the boats? How could a bidder make ''computations as to work needed to be done'' when no one knew or could have ascertained at that time that any additional repairs would be found necessary? Surely, Respondent cannot claim that it knew of the defects which the Court's Finding No. X states were subsequently discovered by its inspector during the course of the job. If so, then its failure to list the same in ''Category A Items'' would constitute a fraudulent concealment and a positive fraud on the bidder. Of course, the fact is that no one knew that there were any defects in the lifeboats other than ''Category A Items'' until long after Libelant's bid was accepted.

THE CONCLUSIONS OF LAW ARE CONTRARY TO LAW.

The Court's *Conclusion of Law No. I* is the decision of the case and the basis for the Court's judgment in favor of the Respondent. The said Conclusion No. I is directly contrary to law. By its said conclusion, the Court determined that the extra work here in

question was "contemplated by and provided for in the specifications" and from this the Court ruled that "Libelant is not entitled to extra pay above and beyond the contract price . . ."

The Court has here misconstrued the most elementary rules of contract law. The question was not what was "contemplated by and provided for *in the specifications,*" but, to the contrary, the question was what was "contemplated by and provided for" in *Libelant's bid.* There is no question but that, in drawing the specifications and at all other times, Respondent intended to have the lifeboats put in first-class condition before returning them to service. This does not mean, and the specifications do not state, that the successful bidder will have to gratuitously furnish all repairs that may thereafter be found necessary.

Even if the Court were to read into the *specifications* a provision to the effect that the contractor would have to repair all subsequently discovered defects without any compensation therefor, this still would not give legal support to said Conclusion of Law No. I.

Libelant had a right to submit an offer on any terms it saw fit. If Libelant had chosen to do so, it could have submitted a bid which was directly and expressly at variance to the specifications. Likewise, Libelant's bid could have been submitted for repairs to only one of the five lifeboats, if Libelant had chosen to do so. In like manner, Respondent had the right to reject Libelant's bid. But Respondent ac-

cepted said bid exactly as it was submitted, and the said bid is for *"Category A Items" only.* The Court, therefore, cannot legally base a judgment on what the Court concludes was "contemplated by the *specifications.*"

The specifications were a legal concern of the trial Court only to the extent that the same were incorporated into Libelant's bid. Libelant did incorporate into its bid by reference a portion of said specifications, namely, the last three pages thereof following the heading "Category A Items". It is, therefore respectfully urged that the Court was clearly in error in determining that Libelant was not entitled to compensation for the said extra work because of what "was contemplated by the *specifications*" as a whole.

By its *Conclusion of Law No. II,* the Court determined that the decision of the administrative appeal board under Article 5(j) of the Master Contract "was final and conclusive as to Libelant and Respondent."

Conclusion of Law No. III is to the same effect, except that it goes a bit further in holding that the decision of the appeal board under Article 5(j) of the Master Contract "constituted a final and conclusive determination of the dispute as between the contracting parties and therefore cannot be set aside by the Court."

For brevity, said Conclusions of Law Nos. II and III will be here considered together, as they are based upon the same erroneous conclusion of law. As noted

above, the question of law involved in said Conclusions Nos. II and III was disposed of prior to trial by the Court below in its Memorandum Opinion ruling on Respondent's Motion to Dismiss. In said Opinion, the Court determined that:

1. Where the controversy between the parties arises "out of the plans and specifications", an appeal by the contractor to the Respondent's appeal board is governed by Article 5(j) of the Master Contract.

2. That Article 14 of the Master Contract does not apply to such an appeal.

3. That, while Article 14 provides that an appeal under the said article is final and conclusive, there is no such provision in Article 5(j).

4. That the Court withheld its ruling on Respondent's Motion to Dismiss solely because the Court did not have sufficient evidence before it to determine whether Libelant's claim arose "out of the plans and specifications." The said Opinion clearly indicates that Respondent's Motion to Dismiss would have been denied if the Court had been certain that the controversy was one that came within the provisions of Article 5(j) of the Master Contract.

The force of said Memorandum Opinion is not necessary, however, to establish that said Conclusions of Law Nos. II and III are contrary to law.

It has not been nor can it be contended that the controversy between the parties did not arise "out of the interpretation of plans and specifications". Re-

spondent's local Contracting Officer expressly so ruled (Ex. B, Tr. p. 84). Likewise, Respondent's appeal board, namely, Contract Advisory Board, made the same determination (Ex. I, Tr. p. 60). If there was any room for doubt remaining, it was removed by the trial Court in its Findings, as prepared by Respondent. In its Finding No. XI, the Court found that the extra work here in question was required "in order to conform with the *terms and conditions of the specifications* for Repairs MSTSP 51-64"; similar findings appear in the Court's Findings Nos. XII and XIII.

There is no need to labor the point further. Libelant's appeal to Respondent's administrative appeal board came within the provisions of Article 5(j) of said Master Contract and only under said Article 5(j). We must then look solely to the provisions of said Article 5(j) to ascertain whether Libelant waived its right to judicial review and redress in Court when it signed said Master Contract.

It serves no purpose to consider what the position of the parties would have been if Libelant's appeal had been decided under Article 14 of the Master Contract. We readily acknowledge that Article 14 clearly and expressly states that a decision on an appeal under Article 14 is final and conclusive. But, in the instant case, the appeal board refused to entertain an appeal under Article 14 and expressly decided Libelant's appeal under Article 5(j) (Agreed Facts, No. 18, Tr. p. 72). Article 5(j) contains no waiver of a right to a day in Court, either expressly or by impli-

cation. And the trial Court had no power to write a new contract for the parties. The right to redress in Court is one of our most cherished rights, and the same may not be taken away by a trial Court reading into a contract a waiver that was not placed in the contract by the parties. As stated in *The Penker Construction Co. vs. U. S.,* 96 Ct. Cl. Reports 1, p. 37:

> "It is well settled that provisions preventing resort to the courts to settle the rights of the parties are to be strictly construed against excluding this right. This remedy will not be denied unless the language of the contract makes such a conclusion inescapable."

Since Article 5(j) of the Master Contract is silent on the subject, the trial Court was clearly in error in holding that a decision on an appeal under Article 5(j) "constituted a final and conclusive determination of the dispute as between the contracting parties and therefore cannot be set aside by the court."

We are uncertain as to the meaning of the Court's *Conclusion of Law No. IV,* wherein the Court states "that Libelant has failed to prove a cause of action . . ." Apparently, this is another way of stating that Libelant's cause of action is barred by the decision of Respondent's administrative appeal board. If so, we refer to the foregoing pages relative to Conclusions of Law Nos. II and III to show that said conclusion of law is contrary to law.

If, on the other hand, the Court meant by its Conclusion of Law No. IV that there was insufficient

evidence to sustain Libelant's said cause of action, then the Court was guilty of judicial error. The "Agreed Facts" of the case, as established by the Pre-Trial Order, set forth "That . . . Libelant was required . . . to perform *additional* work and furnish labor and materials to effect certain repairs to said lifeboats." This was amplified by the stipulation that the parties made and filed during the trial, wherein the extra work here in question was listed in detail, and it was expressly agreed that the same was of the reasonable value of $6,040.00 (Tr. p. 89). There is nothing in the record at variance with the said agreed facts and stipulation.

It is therefore respectfully urged that the said Conclusions of Law are contrary to law and the facts of the case and that the judgment based thereon is without legal support.

As an indication of the confused reasoning of the trial Court, attention is called to the fact that after the trial Court made its order for "judgment in favor of defendant . . .", the said Court made its aforesaid Conclusion of Law wherein it was determined that

Libelant had no right to redress in Court. In other words, if the said Conclusion of Law were sound, the Court had no jurisdiction to make any order other than an order granting Respondent's Motion to Dismiss.

Carrying the confusion further, the Court chose to ignore its said Order for Judgment. Instead of making such judgment, the Court made and entered a "Final Decree" on March 10, 1954 (Tr. p. 92) under which it was "Ordered, adjudged and decreed that the above entitled action be, and the same is, hereby dismissed. . ." The inconsistency of the said "Final Decree" with said Order for Judgment was so obvious that Respondent filed a motion to have said decree modified so that the same would conform with the said Order for Judgment. Under date of April 5th, 1954, the Court granted said motion and made its Modified Final Decree (Tr. p. 108) granting judgment to defendant instead of dismissing the action. While the said Modified Final Decree does conform with the Court's original Order for Judgment, it is obvious that it cannot be sustained in the face of the Court's said Conclusions of Law, in which the Court ruled that the decision of the administrative appeal board was final and that Libelant could not state a cause of action based upon its said claim. It appears that the trial Court recognized that its said Conclusions of Law were erroneous when it granted Respondent's motion to modify said "Final Decree" so as to change it from a dismissal to a judgment for defendant.

For the reasons set forth above and in the foregoing pages, the trial Court should have granted Libelant's motion to amend the said Findings of Fact and Conclusions of Law (Tr. p. 104) and should have granted Libelant's Motion for New Trial (Tr. p. 105). We respectfully urge that the trial Court was guilty of judicial error in refusing to grant said motions.

It is therefore respectfully urged that the judgment of the trial Court should be reversed, with direction for judgment in favor of Libelant in the sum of $6,040.00.

Dated, San Francisco, California,
February 14, 1955.

Respectfully submitted,
J. THADDEUS CLINE,
Proctor for Libelant.

(NOTE): All emphasis appearing in the foregoing pages has been added.

No. 14,389

In the United States Court of Appeals for the Ninth Circuit

TRIPLE "A" MACHINE SHOP, INC., LIBELANT-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

~~(No. 26198 Admiralty)~~

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

JURISDICTIONAL STATEMENT

The grounds for invoking the jurisdiction of the District Court did not appear in the libelant's pleadings. Libelant-appellant now contends that such jurisdiction exists under 28 U. S. C. 1333; 46 U. S. C. 742, 743, 971; and Admiralty Rule 13 (Brief, pp. 2-3). The findings of fact, conclusions of law, and judgment of the District Court (R. 93-103, 108-109) are not reported. This Court's jurisdiction rests upon 28 U. S. C. 1291 by reason of a notice of appeal filed May 7, 1954, from a modified final decree in favor of the United States filed April 15, 1954 (R. 108-109).

STATEMENT

This libel was brought by Triple "A" Machine Shop, Inc., libelant-appellant here, to recover money alleged to be owed it by the United States for purported "extra work" performed under a contract with the Military Sea Transportation Service, Pacific to repair and alter five lifeboats owned by the Government. The District Court for the Northern District of California, Southern Division, after a trial on the merits, entered judgment for the Government (R. 108-109). The facts as revealed by the Agreed Facts of the Pre-Trial Order and the findings of the District Court may be summarized as follows:

On February 10, 1950, the United States, through its agency Military Sea Transportation Service, Pacific,[1] and Triple "A" Machine Shop, Inc.,[2] entered into Master Contract MST-235 whereby the libelant contracted, upon acceptance of its bids, to make repairs, alterations and additions to vessels of the United States under job orders issued by the Contracting Officer of MSTSP (R. 69). On September 21, 1950, by Invitation to Bid No. P 51-36, MSTSP solicited bids from various ship repair and construction firms in the San Francisco-Oakland area to perform work involving repairs to five Government lifeboats (R. 69). The bids were to be made on the basis of Specification No. MSTSP 51-64, issued the previous day, which set forth the work to be accomplished on the lifeboats (R. 69). The Invitation to Bid advised bidders of the location of the lifeboats, their availability for inspection and that the aforementioned specifications, which accom-

[1] Hereinafter MSTSP.

[2] Hereinafter also referred to as the libelant or the Contractor.

panied the invitation, would become part of the job order upon issuance thereof (R. 95-96).

Thereupon, Triple "A", through its authorized agent, its vice-president and general manager, made a thorough inspection of the five lifeboats as to their condition and need for repairs; the agent, who was also its marine surveyor, made such notes relative to repairs to be accomplished as he deemed necessary (R. 97). Subsequently, on September 29, 1950, Triple "A", by its bid in response to the above invitation, offered "subject to all the terms and conditions of the bid, schedule and instructions relating thereto", to make the necessary repairs to the five lifeboats designated in the invitation and specifications (R. 97). The bid price was $3,775.00 and was submitted on the basis of computations as to work necessary and cost thereof by Triple "A" 's aforementioned agent (R. 97).

On October 2, 1950, MSTSP accepted the bid of Triple "A" and issued Job Order No. 10 in accordance with Articles 3 and 4 of Master Ship Repair Contract No. MST-235 and the Invitation (R. 98). By such job order libelant was directed to "furnish the supplies and services required to perform the work described in Specification No. MSTSP 51-64" at the agreed total price of $3,775.00 (R. 98). This job order was accepted by libelant under the date of October 11, 1950 (R. 34-36). Thereafter Triple "A" entered upon the performance of the work pursuant to the master contract, the specifications and the job order. On November 27, 1950, MSTSP issued Change Order A to Job Order No. 10 providing for Addition No. 1 to the specifications, increasing the job order price and authorizing payment to libelant of $9,490.00 for replacement of air and pro-

vision tanks in four of the lifeboats (R. 98). The change order was issued in conformance with the specifications, which expressly excluded replacement of deteriorated tanks from the work to be accomplished at the bid price (R. 98).

Prior to completion of the repairs to the five lifeboats the Coast Guard and an inspector for MSTSP made an inspection of the boats pursuant to the specifications (*infra,* p. 36) and determined that certain repairs were necessary in order to insure compliance with Federal statutory requirements as to seaworthiness (R. 99). On October 16, 1950, libelant was directed to furnish the requisite materials and to accomplish the repairs necessary to effect complete repair and reconditioning of the lifeboats as prescribed in the specifications (R. 99-100). Triple "A" advised MSTSP that it expected extra compensation for the work found necessary as a result of the inspection (R. 100), however, it was informed formally by MSTSP, through the Contracting Officer, that the labor and materials for which extra compensation was requested were considered to be fully covered by the specifications and job order and that no added compensation would be paid (R. 100). Libelant proceeded with the work under written protest and with notice to the Contracting Officer that it would require payment of the reasonable value of the additional work (R. 71).

On November 2, 1950, in response to a written demand for further compensation for the work ordered, the Contracting Officer, MSTSP, again made a formal determination, communicated to libelant, that the specifications and job order required libelant to do all work necessary "to completely repair" and to recondition

the lifeboats and that the work and materials libelant was directed to furnish were not "extra", were not outside the terms, scope and provisions of the contract, and therefore the claim for additional payment would be denied (R. 100). Libelant appealed the Contracting Officer's decision to the Commander, Military Sea Transportation Service, (MSTS), Washington, D. C., the appeal being taken pursuant to both Articles 5(j) and 14 of the Master Contract (*infra,* pp. 34-36) (R. 101).[3] The dispute was referred by the Commander, MSTS, to the Contract Advisory Board for decision. That Board determined that the dispute concerned a question arising out of the interpretation of plans and specifications and therefore came within Article 5(j) of the master contract (R. 72). Substantively, the Board held that the specifications and job order fully covered all work required of libelant, and accordingly there was no entitlement to extra compensation. (R. 72).

Subsequently, on October 1, 1952, this libel was brought in the United States District Court for the Northern District of California, Southern Division (R. 1-6). The libel stated three claims for monies due from the United States for the repairs done by libelant: the first was for the $3,775.00 the United States agreed to pay under the original job order (R. 4); the second was for the $9,490.00 the Government agreed to pay for the repairs performed pursuant to the change order (R. 4-5); and the third claim was for $6,342.00 for the

[3] Libelant had originally believed that the dispute was covered by Article 14 of the Master Contract rather than Article 5(j). When informed that the dispute properly came within Article 5(j), libelant nevertheless insisted upon appealing under both articles (R. 64, 80-84).

repairs found necessary upon inspection by Government representatives and which libelant alleged was due it under its interpretation of the contract (R. 5-6).[4] The Government answered, alleging prior payment of the first two amounts and denying liability for the third claim (R. 11-18). In addition, it was affirmatively alleged that the third claim was barred as the result of its final disallowance by the Contract Advisory Board pursuant to Article 5(j) of the master contract (R. 14-18). When it was shown by the Government that the first and second claims had been paid previously, libelant dropped those counts and the case was tried with only the third claim in dispute (R. 70).

On October 30, 1953, the Government moved to dismiss the libel on the basis of the pleadings, exhibits and documents on file (R. 67). The Government contended that the decision of the Contract Advisory Board was determinative of this matter under Article 5(j) of the master contract. In opposition, libelant urged that the administrative determination made pursuant to Article 5(j) was not, by the terms of the contract, final and conclusive, and that it was entitled to adjudication of the matter, on its merits, in the courts (R. 89). The District Court (per Louis E. Goodman, J.), on December 11, 1953, issued an Order Reserving Ruling on the Motion to Dismiss (R. 87-89). The Court held that there was no occasion for it to decide whether determinations made pursuant to the procedure prescribed in Article 5(j) were intended by the parties to be final unless the disputed matters were of the class required to be determined by Article 5(j) (R. 89). The Court stated that it could not ascertain from the plead-

[4] The value of the labor and materials furnished by the contractor for this work was subsequently agreed to be $6,040.00 (R. 89-91).

ings, exhibits, and the agreed statement of facts whether the matters in dispute were of the class to be determined under Article 5(j) or Article 14 or in some other manner and that only the evidence at the trial would clarify the issue. Therefore, pursuant to Rule 12(d), Federal Rules of Civil Procedure, ruling on the motion to dismiss was reserved until after the trial (R. 89).

Subsequently, on March 10, 1954, after a trial on the merits of the disputed claim, the District Court (per Michael J. Roche, J.) ordered entry of judgment precluding recovery by libelant. First, the Court held, on the basis of its own independent analysis of libelant's contractual obligations, that the contested work was contemplated by and provided for in the specifications and job order and accordingly that the libelant was not entitled to extra pay therefor above and beyond the contract price as submitted by libelant in its bid for repairs and agreed to by the parties (R. 102). In addition, the Court sustained the Government's argument as to administrative finality. It held that the Contracting Officer, and the Commander, MSTS, acting pursuant to Article 5(j) of the master contract, having determined that the alleged "extra work" was provided for and contemplated by the specifications, job order, and bid and that pay above and beyond the agreed contract price was not contemplated or provided for in the repair agreement, such determination was final and conclusive on the parties and could not be set aside by the Court (R. 102-103). The Court rejected libelant's contention that if the dispute was governed by Article 5(j) of the master contract, rather than Article 14, administrative determination of the dispute was not

final (R. 103). Judgment was entered for the Government accordingly (R. 108-109).[5]

QUESTIONS PRESENTED

1. Whether the District Court properly determined that the alleged "extra work" required of libelant by the Government, so as to repair the vessels completely, fell within libelant's contractual obligations under its original bid price.

2. Whether, under the facts of this case, the District Court was correct in holding that the administrative determination of this dispute under Article 5(j) of the master contract constituted a final and conclusive determination of the controversy between the parties.

STATUTE AND CONTRACT PROVISIONS INVOLVED

Public Law 356, 83rd Congress, Second Session, 68 Stat. 81; and the relevant provisions of Master Contract No. MST-235; Specification No. MSTSP 51-64; and Job Order No. 10 are set forth in the Appendix, *infra,* pp. 32-37.

SUMMARY OF ARGUMENT

The decision of the District Court precluding recovery from the Government by Triple "A" for the alleged "extra work" on the lifeboats in question, was grounded on dual, but independent foundations: first, the Court's own determination of the dispute under the governing contractual documents; and second, the conclusiveness the court held was to be accorded the

[5] The original decree, entered March 10, 1954, provided that "the cause * * * is hereby dismissed". (R. 92-93). By a Modified Final Decree lodged April 5, 1954, this was amended to read "that judgment be entered in favor of the respondent United States of America," so as to conform to the Court's prior Order for Entry of Judgment (R. 108-109).

administrative determination of this dispute under Article 5(j) of the master contract. Analysis of the pertinent provisions of the relevant documents in the light of the facts of the instant case clearly substantiates these holdings and necessitates affirmance.

Finality aside, it is evident from an examination of the express language of the controlling documents that libelant's contractual duty was to effect the "complete repair" of these lifeboats, and encompassed the so-called "extra work" for which additional compensation is now sought. The master contract, the Invitation for Bids, the bid, and Job Order No. 10 undeniably make Specification No. MSTSP 51-64 the focal document in ascertaining the extent of libelant's contractual responsibility to the Government under its original bid price. Under any realistic appraisal of the dealings between libelant and the Government, these specifications, in their entirety, delineated libelant's commitment to repair. This conclusion is reached whether the contract be considered as embodying all of the aforementioned documents and they are considered together; whether the technical offer by bid and its acceptance by the issuance of the job order alone are considered as constituting the contract; or whether the job order as accepted by libelant is the final agreement of the parties. As to the content of the specifications themselves, they explicitly state that it is their intent "to provide for the complete repair and reconditioning" of these boats, "all as necessary to place [them] in first class operating condition and ready for use" (*infra,* p. 36). Moreover, the contractor was to furnish "all labor, materials, transportation and all other equipment necessary to completely repair" these lifeboats, with the

express proviso that the "work shall include but shall not be limited to any detailed specifications which follow" (*infra,* p. 36. In addition, libelant's work was specifically to be subject to inspection and approval by designated Government inspectors (*infra,* p. 36). In view of this unequivocal language it is apparent that libelant assumed the risk of ascertaining the amount and cost of repairs necessary "to completely repair" the vessels and that the court below was compelled to hold that libelant was not entitled to greater compensation than the agreed contract price as submitted by Triple "A" in its bid for repairs.

Apart from the above conclusion, which was reached only after a trial on the merits and the Court's own independent ascertainment of libelant's responsibilities under its bid, the same result is dictated by Article 5(j) of the master contract. The instant dispute, arising as it does out of the interpretation of specifications, was properly determinable under Article 5(j). Having been submitted under Article 5(j) to a determination by the Contracting Officer and affirmed on appeal by the designated representative of the Commander, MSTS, such administrative determination is, by the clear import of that article, conclusive of this dispute. The District Court properly held that it bound the parties. Nor is this result changed by the recent act of Congress limiting the effect, for purposes of judicial review, of finality clauses in Government contracts. Act of May 11, 1954, 68 Stat. 81 (*infra,* p. 32). That Act's prohibition against inclusion of law disputes clauses in Government contracts is applicable solely to future Government contracts. Respecting administrative determinations under such clauses in existing Government contracts, the Act specifically provides that such

decisions shall be final and conclusive unless they are fraudulent or capricious, or arbitrary or so grossly erroneous as necessarily to imply bad faith, or are not supported by substantial evidence. Such allegations as to this determination cannot seriously be made here, nor could they be sustained if made in view of the District Court's independent finding, after a trial on the merits, that the dispute was correctly resolved.

ARGUMENT

I

The District Court, on the Basis of Its Own Independent Determination, Properly Held That the Alleged "Extra Work" Performed by Libelant Was Encompassed in Its Contractual Commitments Under the Original Bid Price.

The primary basis for the decision below, denying libelant's prayer for additional compensation for the purported "extra work" performed at Government direction, was the District Court's own determination that the disputed work fell within the libelant's contractual obligations under its original bid. This conclusion was reached by the Court only after a trial on the merits of this issue, and independently of any finality thereafter held to be conferred upon the Government's resolution of this dispute under Article 5(j) of the master contract. Careful analysis of the facts of the instant case within the framework of the relevant and governing contractual documents, particularly the specifications, substantiates the District Court's position.

A. *The Specifications Were the Controlling Element in Defining Libelant's Commitments Under the Contract for Repair*

In our view, and also in the view of the District Court, the critical instrument for ascertaining the extent of libelant's responsibilities under its bid is Specification No. MSTSP 51-64. This was the primary document setting forth the work to be performed by libelant under its bid. It was referred to in the master contract, attached to the Invitation for Bids and incorporated in the bid and job order. Clearly, it was intended to be the basis for libelant's bid and was so recognized. Its terms, we believe, are controlling. However, to place the specifications in their proper context, prior examination of the other relevant documents is in order.

The document for initial consideration must be Master Contract No. MST-235. This contract, entered into by libelant and the Government on February 10, 1950, was the overriding agreement controlling all future contracts for repair made thereunder between the named parties. Specifically it provided that its purpose was "to establish the terms upon which the Contractor will effect repairs, completions, alterations of and additions to vessels of the Government under job orders issued by the Contracting Officer from time to time under this contract" (*infra,* p. 33). Agreement to its terms was a condition precedent to any specific job awards by the Government. Under the procedure established by that contract, when it was determined that a Government vessel required repair or alteration the contracting officer was to invite bids from contractors under master contract, after notifying them of the work to be performed and the times for commence-

ment and completion. If the individual contractor was willing and able to perform the work he was to inspect the work to be accomplished on the vessel and submit a bid for its performance.[6] By the terms of the above contract, the contractor "shall as promptly as possible after inspection of the work submit a bid for the performance of the work *in accordance with plans and specifications* furnished or to be furnished by the Government" (emphasis added) (*infra,* p. 33). If after receipt of all bids the contracting officer determined that the work was to be awarded to any individual contractor the price for the work was to be set forth in a job order, which job order was to be signed and issued by the contracting officer and signed and acknowledged by an authorized representative of the contractor (R. 27-28). Upon issuance of the job order, the master contract states, "the Contractor shall promptly commence the work specified therein and in any plans and *specifications made a part thereof,* and shall diligently prosecute the work to completion to the satisfaction of the Contracting Officer" (emphasis added) (*infra,* pp. 33-34).

Clearly then, the master contract envisages the specifications as the key element in defining the extent of the bidder's contractual liability to repair. This position is fortified by inspection of Invitation No: P 51-36, the invitation for bids in the instant case (R. 51-58). Schedule No. P 51-36-1 of this invitation provides as follows in pertinent part (R. 52):

> * * * 6. The following drawings and specifications accompany this schedule and upon the issuance of a Job Order, become a part thereof: Speci-

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[6] The Master Contract also provided for job contracts by negotiation as contrasted to bid (R. 26-27). There is no dispute that the job contract in question was effected through the bid technique.

> fication No. MSTSP 51-64. Repairs to Five (5) Lifeboats.

Thus, potential bidders were notified by the invitation, through the accompanying specifications, of the extent of the repairs intended to be effected under the proposed job award and it was also made clear that these specifications, in their entirety, would become part of the job order when issued. It is difficult to conceive how a prospective bidder could reasonably believe that the basis for his inspection and bid was other than the attached specifications or that the Government would accept bids on any other basis.

Moreover, libelant's bid itself states that it is made (R. 58):

> In compliance with Invitation for Bids Number P 51-36 * * * and subject to all the terms and conditions of the bid, *schedule,* and instructions relating thereto: * * * (emphasis added).

And as indicated previously, the "schedule" of the above invitation incorporates the specifications and states that upon issuance of a job order the specifications are to become part of that order. Furthermore, the bid states that if it is accepted the libelant agrees to accept a job order (R. 59), and such job order would perforce include Specification No. MSTSP 51-64, in accordance with the schedule of the invitation and the master contract, to which the bid was expressly subject.

Job Order No: 10, which was the order foreshadowed by the master contract, the invitation and the bid, expressly incorporates the specifications as a whole, making them the basis of the work to be performed, stating (*infra,* pp. 36-37):

> 1. Work: The Contractor shall furnish the supplies and services required to perform the work described in the attached plans and specifications made a part hereof and designated as follows: Repairs to Five (5) Lifeboats, Specification No. MSTSP 51-64.

This job order received written acceptance by libelant (R. 36).

Clearly, therefore, the terms of the specifications constitute the essential descriptive element in this contract for repair and are controlling in delineating the extent of libelant's commitments to repair under its bid price. It is to those terms which we now turn.

B. *Under the Terms of the Specifications Calling for the Complete Repair of these Vessels, the Alleged "Extra Work" Fell Within Libelant's Obligation to Repair under its Original Bid*

(1) Specification No. MSTSP 51-64 (R. 36-42) is the instrument containing the repair specifications for the five lifeboats in controversy. The language of this document fully supports, if it does not compel, the decision of the District Court; namely, that *complete* repair of these lifeboats was provided for and that compensation above and beyond the bid price of $3,775 to effect those repairs was unwarranted.

The introductory language of these specifications is quite explicit in stating (*infra* p. 36):

> It is the intent of these specifications to provide for the complete repair and reconditioning, both mechanically and structurally, of five (5) lifeboats, all as necessary to place the boats in first class operating condition and ready for use.

The specifications go on to provide that "the contractor shall furnish all labor, materials, transportation and all other equipment necessary to completely repair" these lifeboats (*infra* p. 36). Although the specifications detail some of the work encumbent upon the contractor in performing its job, it is expressly stated that, "The work shall include, but shall not be limited to, any detailed specifications which follow" (*infra* p. 36).[7] It is then provided that "All work shall be subject to inspection and approval by the U.S. Coast Guard and the U.S. Navy Inspector assigned" (*infra* p. 36).

Fortifying the conclusion that complete repair of these vessels was the purport of the specifications and that extra compensation was not intended for work not detailed in the specifications is the one exception contained in that document. It was provided that replacement of deteriorated tanks was to be accomplished only on a written field order, which under Article 6 of the master contract called for extra compensation (R. 38). Significantly, this was the only provision in the contract for extra work.[8] Since extra work in this respect was specifically provided for as an exception to the prior provisions for complete repair of the vessels, it is evident that the work contemplated under this document was not limited to the itemized repairs relied upon by libelant (*infra,* pp. 17-21), with other repairs to be ac-

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[7] Libelant's agent testified that he was aware of this language in the specifications at the time he made his inspection prior to submission of the bid (R. 151).

[8] In fact, renewal of air and provision tanks in four of the lifeboats was found to be necessary. Pursuant to the specifications, Change Order "A" to Job Order No: 10, and Addition No. 1 to the specifications were issued to authorize these repairs (R. 43-45). In accordance with Article 6 of the master contract, the job order price was increased by $9,490 to compensate for this extra work (R. 43). This sum has been paid to libelant (R. 46).

complished only for extra compensation, but rather included all work necessary to repair the lifeboats completely.

(2) Libelant attempts to circumvent the explicit terms of the specifications in several different ways. However, analytical examination of these contentions reveals that they are unavailing.

Libelant's primary contention is that the terms of its bid, which constituted its offer to repair, limited its contractual obligation to the repair of only those "Category A" items detailed in the specifications, and that the specifications as a whole formed no part of its contract with the Government. In view of what has been shown (*supra,* pp. 12-17) this position is simply untenable. Libelant's bid was expressly made subject to the schedule of the invitation in which was incorporated the entire specifications. Moreover, libelant in its bid agreed to accept the job order issued, and such job order, by the very terms of the master contract, and the invitation, was to include the specifications for repair; the same specifications with which libelant had been furnished at the time the invitation was issued.

Furthermore, contrary to libelant's assertion, it is not merely the terms of the bid which control its contractual obligations, but also the terms of the acceptance of that bid. It is true that as a matter of contract law the bid constitutes the specific offer in this instance, the invitation merely constituting a preliminary invitation for an offer.[9] It is also true that an acceptance must acquiesce in the offer as made to constitute a valid ac-

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[9] However, in seeking light on the meaning of words used in a contract prior negotiations may be considered. *Pacific Portland Cement Co.* v. *Food Machine and Chemical Co.,* 178 F. 2d 541, 552 (C.A. 9).

ceptance forming a contract, and that if the acceptance deviates from the terms of the offer it is a rejection of the offer. *Minneapolis and St. L. R. Co.* v. *Columbus Rolling Mill,* 119 U.S. 149; *Iselin* v. *United States,* 271 U. S. 136, 139; 1 Corbin on Contracts, § 82. From this libelant apparently contends that since, in its view, its bid was limited to the "Category A" items detailed in the specifications, its potential contractural responsibilities were also so restricted. However, aside from the fact that libelant's offer or bid was expressly made "subject to" and in effect incorporated all of the specifications, and that such specifications were not limited to repair of the listed "Category A" items, but stated in the most precise terms that the "work shall include but not be limited to any detailed specifications which follow" (*infra,* p. 36), libelant's contention fails on other grounds. An acceptance which deviates from the terms of an offer is more than a mere rejection, it also constitutes a counter-offer which may in turn be accepted by the original offeree. *Iselin* v. *United States,* 271 U. S. 136, 139; *Baltimore and O. R. Co.* v. *Youngstown Boiler and Tank Co.,* 64 F. 2d 638 (C.A. 6); *American Lbr. and Mfg. Co.* v. *Atlantic Mill and Lbr. Co.,* 290 Fed. 632, 635 (C.A. 3); *Cleborne* v. *Totten,* 57 F. 2d 435, 438 (C.A. D.C.); 1 Corbin § 89; Restatement, Contracts, §60. The Government's acceptance was, by the terms of the master contract (Article 3) and the invitation (Section 7), to be in the form of a job order (R. 27-28, 52). The job order which here issued stated that the Contractor was to "furnish the supplies and services required to perform the work described" in Specification No. MSTSP 51-64 (*infra,* pp. 36-37). If this job order is not considered to be an acceptance of the identical offer made by libelant, and

we insist that it was, then it constituted a counter-offer to pay $3,775.00 for the performance of the work as set forth in the entire attached specifications. This counter-offer was accepted by libelant, not only by virtue of the fact that work on the vessels was commenced pursuant thereto (*McKell* v. *Chesapeake and Ohio R. Co.,* 175 Fed. 321, 328 (C. A. 6), certiorari denied, 220 U. S. 613; *American Lbr. and Mfg. Co.* v. *Atlantic Mill and Lbr. Co.,* 290 Fed. 632, 635 (C. A. 3); Annotation 135 A. L. R. 821, 826), but also because this job order was signed as "accepted" by libelant (R. 36), pursuant to Article 3(a) of the master contract (R. 27-28). In fact, libelant's principal agent in this dispute conceded that this job order was a part of libelant's contract (R. 172). Therefore, even under a proper resolution of libelant's own theory, it has no ground for complaint since the specifications as a whole still controlled.

Nor can the District Court's conclusion be avoided by what libelant insists must be a strict construction of the terms of the contract against the Government. Concededly, as a general guide for contract construction, the terms of the instrument will be construed against the party drafting the instrument. Since in the present case the Government drafted the controlling documents, libelant contends that ambiguities must be resolved in its favor. The principal difficulty with this argument is that ambiguities in the contract are essential to the application of this construction aid. Here, the language of the controlling documents is plain and unambiguous. The specifications expressly and repeatedly call for complete repair, and specifically do not limit the work to be done to the detailed items set forth therein (*infra,* p. 36). In view of this express language, the need for the application of the strict construction doctrine disappears for it is equally well established that courts will

not read ambiguities into a contract where none exist, or distort the plain language of a contract to create ambiguities, just to avoid hard consequences. *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 492; *Whiting Stoker Co.* v. *Chicago Stoker Corp.,* 171 F. 2d 248, 250-251 (C. A. 7), certiorari denied, 337 U. S. 915.

Finally, libelant contends that all of the repairs insisted upon by the Government, in order to insure compliance with Federal statutory requirements as to seaworthiness, were not ascertainable through inspection by libelant's agent prior to submission of its bid. Therefore, libelant insists these repairs could not have been encompassed within the terms of its bid. However, this assertion was considered by the District Court and extensive testimony was taken on this point. On the basis of all of the evidence adduced, the trial court found that such items of repair were subject of inspection and ascertainment by libelant's representative prior to submission of the bid (R. 99). In view of the record below, this finding of fact can hardly be characterized as clearly erroneous. Cf. R. 154-162.[10] Moreover, the terms of the specifications, which libelant had before it at the time of its preliminary inspection, were unequivocal in notifying bidders that "complete repair" of the vessels was intended under the job order to be issued, and that the bidder's obligation would not be limited to any repairs detailed therein (*infra,* p. 37). Therefore, as in any case where bids are called for to effect repairs

[10] That a trial court's findings in an admiralty case are sustainable unless clearly erroneous is settled under the governing decisions. *McAllister* v. *United States,* 348 U.S. 19; *Petterson Lighterage and Towing Corp.* v. *New York Cent. R. Co.,* 126 F. 2d 992, 994-995 (C.A. 2); *Boston Ins. Co.* v. *Dehydrating Process Co.,* 204 F. 2d 441, 444 (C.A. 1); *C. J. Dick Towing Co.* v. *The Leo,* 202 F. 2d 850, 854 (C.A. 5).

in accordance with certain express specifications, the burden is on the bidder to inspect, appraise and to reach its own conclusion as to the cost of repairs. If the cost is greater than the contractor anticipated, that is encompassed in the risk of undertaking such a job and creates no right to further compensation. Cf. *MacArthur Brothers Co.* v. *United States,* 258 U.S. 6, 12-13; *Day* v. *United States*, 245 U.S. 159, 161; *The President Roosevelt,* 116 F. 2d 420 (C. A. 2).[11]

II

The District Court Correctly Ruled That the Administrative Resolution of this Dispute, Pursuant to the Provisions of the Master Contract, Was Final and Dispositive.

As a secondary basis for precluding recovery by libelant, the court below held that the administrative determination of this dispute, pursuant to Article 5(j) of the master contract, constituted a final and conclusive decision as between the contracting parties and was dispositive. Although libelant has had its sought-after judicial reexamination of the dispute through a trial on the merits and has no proper ground for complaining that the District Court also ruled against it on the basis of the finality to be accorded the administrative determination of the dispute under Article 5(j), we deem it necessary to deal with this issue of finality not only as a basis for affirmance of the decision below, but

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[11] Libelant's attempt to manipulate the Government's and the District Court's use of the words "additional work" into a confession that the disputed work was, in fact, "extra work" (Brief, pp. 24-25), is transparent and unavailing. The term "additional work" was used to characterize the disputed work so as to distinguish it from the work which even libelant conceded it was bound to perform and had performed prior to Government inspection. Obviously, neither the Government nor the trial court believed the work to be "extra" and outside the scope of the contract.

also because we believe that the libel should have been dismissed on this ground.

A. *Administrative Determination of Disputes under Article (5j) of the Master Contract Are Properly Conclusive upon the Contracting Parties.*

(1) Initially, it is firmly established that where the contract so provides, a large degree of finality can be accorded decisions by Government officers of disputes arising under a Government contract.[12] *United States* v. *Wunderlich,* 342 U.S. 98; *United States* v. *Holpuch,* 328 U.S. 234; *Ripley* v. *United States,* 223 U.S. 695. It is likewise settled that finality as to such administrative determinations extends to disputes over interpretation of the terms of the contract. *United States* v. *Moorman,* 338 U.S. 457; *United States* v. *McShain,* 308 U.S. 512; *Merrill-Ruckgaber Co.* v. *United States,* 241 U.S. 387. Libelant attempts to avoid the impact of administrative finality by contending that the contractual provision which is here controlling, Article 5(j), fails to expressly provide that conclusiveness is to be accorded decisions thereunder. In contrast, libelant asserts, Article 14 of the master contract, which provides for the determination of disputes other than those covered by Article 5(j), establishes a different procedure for the administrative resolution of such disputes, and expressly provides that those decisions are to be final and conclusive.

These mechanical distinctions, however, were disregarded by Chief District Judge Roche in his final dis-

[12] The extent to which judicial review of such administrative determinations can be precluded will be discussed in some detail *infra,* pp. 28-31.

position of this libel when he held that administrative determinations under Article 5(j) were also entitled to finality. This holding, we submit, is correct. However, since libelant professes to find support for its thesis in Judge Goodman's opinion accompanying his reservation of ruling on the Government's Motion to Dismiss, it might be best to examine the procedural background of this dispute's administrative determination prior to any analysis of Article 5(j) itself.

(2) Originally libelant submitted this dispute to administrative determination under Article 14 of the master contract (R. 64-65). It was thereupon advised that the proper avenue for determination was Article 5(j) since the dispute was grounded upon a question of interpretation of the specifications (R. 84-85).[13] Thereafter, libelant notified MSTS that it was submitting the dispute for resolution under both articles

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[13] The master contract contains two provisions for the administrative determination of disputes—Articles 5(j) and 14. Article 14 is the general disputes provision of the contract, and sets forth the procedure for the determination of any dispute concerning a question of fact or price arising under the contract, or any job order or plan or the specifications, other than matters to be determined under Article 5(j). Article 5(j) prescribes the means for settlement of "any questions regarding or arising out of the interpretation of plans or specifications" or any inconsistency between plans and specifications (*infra*, pp. 34-36).

Article 14 establishes essentially a two-stage procedure for administrative determination—referral of disputes between the Contracting Officer and Contractor to the Commander, MSTS, for the initial unilateral determination, and appeal to the Secretary of the Navy (*infra*, pp. 35-36). The decision of the Secretary is made final and conclusive, and in the event no appeal is taken to the Secretary, the decision of the Commander, MSTS, is binding. Article 5(j) prescribes a two-stage procedure—initial determination by the Contracting Officer and appeal to the Commander, MSTS, or his representative. Article 5(j) does not specify that the Commander's decision shall be final and conclusive (*infra*, pp. 34-35).

(R. 81). However, in making its final determination the Contract Advisory Board, MSTS, ruled that the dispute was covered solely by Article 5(j) and denial of libelant's claim was made pursuant to that article (R. 61). Subsequent to the filing of the pleadings in this case, the Government moved for a dismissal, relying upon the finality of the prior administrative determination of the dispute under Article 5(j) (R. 67). Libelant countered, alleging that the dispute, if governed by Article 5(j), was not final under the terms of that article and therefore that it was entitled to judicial adjudication of the dispute. The District Court, in passing on this motion, did not rule, as contended here by libelant, that if the dispute fell within Article 5(j) the administrative decision would not be final. Its exact holding is embodied in the following language of its order (R. 89):

> There is no occasion for the court to decide whether determinations made pursuant to the procedure prescribed in Article 5(j) were intended by the parties to be final, unless the matters here in dispute were of the class required to be determined under Article 5(j).

The Court went on to state that it could not be determined from the pleadings, exhibits, and the agreed statement of facts whether the matters in dispute fell under Article 5(j) or Article 14 and that only the evidence at the trial would clarify the issue. Therefore, it reserved ruling on the motion to dismiss until the trial, in accordance with Rule 12(d), Federal Rules of Civil Procedure (R. 89). After the resultant trial on the merits, the Court, as previously indicated, held for

the Government, primarily upon the basis of its own evaluation of libelant's contractual commitments, and secondarily upon the basis of the dispute's falling within Article 5(j) and the finality attributable to administrative determinations under that article.[14]

(3) Turning now to the District Court's ultimate holding as to the finality attributable to Article 5(j) determinations, we find that it is abundantly sustained by relevant legal and factual considerations.

The fact that disputes as to interpretation (Article 5(j)) were placed in a separate category from disputes concerning questions of fact or price (Article 14) is certainly not controlling. Interpretive disputes are generally considered to be disputes over legal questions and are commonly treated separately from factual disputes in providing for their resolution in Government contracts. The Supreme Court has recognized this practice, taken note of its basis, and approved it. *United States* v. *Moorman,* 338 U. S. 457, 463. For the same reasons, the fact that differing procedures are set up by Articles 5(j) and 14 is not controlling. Questions concerning interpretation of the terms of these contracts are by their nature peculiarly within the final purview of MSTS and especially its Contract Advisory Board. Moreover, as the record shows, the Contract Advisory Board which rendered the "final decision" of MSTS (*infra,* p. 34) did so only after libelant's representative appeared before the Board on June 6, 1952, discussed the issues involved and advised the

[14] Significantly the Modified Final Decree provided that "judgment be entered herein in favor of the respondent United States of America" (R. 109), in accordance with the Order for Entry of Judgment (R. 91), and not that the action be "dismissed" as was inadvertently provided for in the original final decree (R. 93).

Board of the Contractor's position (R. 61).[15] In addition, libelant's attorney gave further written notification to MSTS, prior to that body's final decision, of the detailed basis for libelant's claim (R. 80-84). After a full hearing of the evidence and a careful consideration of the arguments presented by libelant's representatives, the Board determined that the specifications as bid upon by the Contractor, and the job order, as amended, were to be construed to include all of the work performed by Triple "A" with respect to the lifeboats in question and that extra compensation was not warranted (R. 61). It is evident therefore that the final decision under Article 5(j) was made only after the Contractor had been accorded the same right to be heard and offer evidence as precedes a final decision of the Secretary under Article 14.[16]

Nor is the fact that Article 5(j) does not use the terms "final and conclusive" prohibitive of the application of the finality principle to this type of dispute. The proper criterion for determining finality is not a mechanical construction of the language of the contract, but the ascertainment of the intent of the parties. Cf. *United States* v. *Moorman,* 338 U. S. 457, 462. Although the intention of parties to submit their con-

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[15] Libelant's representative was Mr. William Blake, its vice-president, general manager, and marine surveyor. (R. 61).

[16] Under Article 14, after the contracting officer's decision, the dispute, if not resolved by agreement between the contractor and the contracting officer, is to be referred to MSTS, which makes the initial unilateral determination. There is no provision for a contractor's being heard or presenting evidence to MSTS prior to its determination, as there is under Article 5(j) (R. 32-33). It is only in connection with appeals to the Secretary that hearings and presentation of evidence prior to a final decision are provided for under Article 14 (R. 33). Therefore, the procedures under the two articles are, in theory and in practice, roughly analogous.

tractual disputes to final determination outside the courts should be made manifest, "it is not necessary that any set form of words be used to express the purpose". *United States* v. *Hurley,* 182 Fed. 776, 779 (C.A. 8). In two of the earliest cases concerning the finality attributable to decisions of Government officers resolving disputes under Government contracts, the Supreme Court upheld finality of the officers' decisions notwithstanding the absence in the relevant contractual provisions of such words as "final", "binding" or "conclusive". *Kihlberg* v. *United States,* 97 U. S. 398; *Sweeney* v. *United States,* 109 U. S. 618.

Moreover, in *United States* v. *Gleason,* 175 U. S. 588, the Court addressed itself to allegations analogous to those now made by appellant. In *Gleason* the contract also contained two clauses for administrative resolution of disputes—one explicitly providing for finality—and the other, governing the claim then under consideration, not expressly saying that the Government agent's decision shall be final. That tribunal found no difficulty in holding that notwithstanding the absence of the word "final", under a proper construction of the contracts, finality was attributable to the agent's determination. 175 U.S. at 604-606, 608-609. See also *United States* v. *Hurley,* 182 Fed. 776, 778-779 (C.A. 8).

What the cases seem to require, therefore, is clear indication that the parties intended the administrative decision to be final. Here, a reasonable construction of Article 5(j) would indicate, as it did to the District Court, that finality was intended. The article expressly provides that its disputes "shall be determined by the Contracting Officer" subject to an appeal to and the "final decision" of the Commander, MSTS, or his duly

authorized representative (*infra,* pp. 34-35). Moreover, in line with the Supreme Court's observation in *Moorman* as to the intent of the parties controlling, it should be pointed out that Triple "A" apparently intended that this type of dispute be governed by a "finality" clause, since it originally submitted its dispute under Article 14, and persisted in contending that the dispute was covered by that article, which even it concedes provides for administrative finality. Therefore, it can hardly be claimed that there was no meeting of minds, or that an estoppel existed with regard to finality, at least respecting the type of dispute involved herein.[17]

B. *The Act of May 11, 1954, 68 Stat. 81, Limiting the Effect of Finality Clauses in Government Contracts, Does Not Impair the Decision Below.*

On May 11, 1954, subsequent to the date of entry of the final decree in this action,[18] legislation was enacted by Congress affecting finality clauses in Government contracts. Public Law 356, 83d Cong., 2d Sess., 68 Stat. 81 (*infra,* p. 32). Prior to the passage of the above law, if a Government contract provided for administrative determination of disputes over questions of law or fact arising under the contract, judicial review of such decisions was limited to cases where fraud by the determining official or board was alleged

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[17] This also undermines contentions that the contract should be construed against the drawing party, since libelant itself believed that this type of dispute was subject to finality by administrative decision, even though under a different article of the master contract.

[18] The Modified Final Decree was entered on April 16, 1954 (R. 109).

and shown. The term "fraud" was defined by the Supreme Court as "conscious wrongdoing, an intention to cheat or to be dishonest." *United States* v. *Wunderlich,* 342 U. S. 98, 100. Although the recent legislation wrought certain changes in the scope of judicial review of such disputes, these alterations, under the facts of the instant case, do not detract from the finality of the administrative determination here in controversy.

Specifically, Section 1 of the Act provides that no provision of any Government contract relating to the finality of decisions of disputes by Government officers or boards shall be pleaded in any suit now filed or to be filed as limiting judicial review of such decisions to cases where fraud on the part of the determining governmental representative is alleged (*infra,* p. 32). However, this section goes on to further provide (*infra,* p. 32):

> That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Section 2 of the Act provides that no Government contract "shall contain" a provision making the decision of any administrative official, representative, or board final on a question of law (*infra,* p. 32).

Initially it is clear that the Act does not prohibit the courts from according a large degree of finality to an administrative determination of a dispute over a question of interpretation where the contract which contains a law disputes clause was entered into prior to

the passage of the Act. Section 2 of the Act is prospective in operation in this regard. It specifies that "no Government contract shall contain" such a provision but it does not invalidate these provisions in existing contracts (*infra,* p. 32). This point is expressly made by the report of the House Committee accompanying the bill which subsequently was enacted into law, when it said:

> Section 2 of the proposed legislation will prohibit the inclusion of such reservation [finality as to law disputes] in future contracts and the first section of the proposed legislation will render decisions made under such reservation in present contracts subject to judicial review under the standards therein prescribed. (Report No. 1380 of the Committee on the Judiciary of the House of Representatives, 83d Cong., 2d Sess., p. 5).

In line with the above, Section 1 of the Act refers to "any decision" by a Government representative under a finality clause and states that "such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence" (*infra,* p. 32). Thus the criteria for sustaining administrative finality by the courts are not limited to factual disputes under a finality clause but also embrace law disputes under such a clause, which, consonant with Section 2 of the Act, was part of a Government contract entered into prior to the legislation's enactment.

Under the standards for upholding administrative finality of these disputes, as set forth in Section 1 of the Act, the decision of the court below, recognizing final-

ity, must stand. In the light of the detailed analysis of the controlling contractual documents that has previously been made (*supra,* pp. 11-21), there can be no serious allegation by libelant that the administrative determination of this dispute was "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence" (*infra,* p. 32). Moreover, the District Court, on the basis of its own examination of the relevant documents and after considering all of the evidence presented by both parties in a trial on the merits, reached the same conclusion as to libelant's contractual obligations under its bid price as had the Contracting Officer and the Contract Advisory Board. With this in mind it can hardly be claimed that the administrative resolution of this dispute transgressed the standards for upholding finality established by the Act. The District Court's ruling on administrative finality must therefore stand.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the District Court should be affirmed.

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APPENDIX

1. Public Law 356, 83d Congress, Second Session, 68 Stat. 81, provides as follows:

> To permit review of decisions of the heads of departments or their representatives or boards, involving questions arising under Government contracts:
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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent, or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.
>
> Approved May 11, 1954.

2. The relevant provisions of Master Contract No. MST 235 between the United States and Triple "A" Machine Shop, Inc., are as follows in pertinent part:

Article 1. Performance

The purpose of this contract is to establish the terms upon which the Contractor will effect repairs, completions, alterations of and additions to vessels of the Government under job orders issued by the Contracting Officer from time to time under this contract.

Article 2. Preliminary Arrangements

* * * * *

(b) In the event the Contractor is willing and able to perform the work, the Contractor and the Contracting Officer, either before or after the arrival of the vessel at the location where the work is to be performed, shall inspect the items of work to be accomplished on such vessel and the Contractor shall as soon as practicable thereafter, as requested by the Contracting Officer, submit a bid or negotiate for the performance of the work. * * * If the Contracting Officer requests the Contractor to submit a bid, it shall as promptly as possible after inspection of the work submit a bid for the performance of the work in accordance with plans and specifications furnished or to be furnished by the Government.

* * * * *

Article 4. Performance

(a) Upon the issuance of a Job Order, the Contractor shall promptly commence the work specified therein and in any plans and specifications made a part thereof, and shall diligently prosecute

the work to completion to the satisfaction of the Contracting Officer. * * *

Article 5. Inspection and Manner of Doing Work

(a) Work shall be performed hereunder in accordance with the job order, and any plans and specifications made a part thereof, as modified by any change order, issued under Article 6.

* * * * *

(j) the Government does not guarantee the correctness of the dimensions, sizes and shapes set forth in any job order, sketches, drawings, plans or specifications prepared or furnished by the Government, except when a job order requires that the work be commenced by the Contractor prior to any opportunity to inspect the vessel. The Contractor shall be responsible for the correctness of the shape, sizes and dimensions of parts to be furnished hereunder except as above set forth and other than those furnished by the Government. Any questions regarding or arising out of the interpretation of plans or specifications hereunder or any inconsistency between plans and specifications shall be determined by the Contracting Officer subject to appeal by the Contractor to Commander, Military Sea Transportation Service, or his duly authorized representative who shall not be the Contracting Officer. Pending final decision with respect to any such appeal, the Contractor shall proceed diligently with the performance of the work, as determined by the Contracting Officer. If it is determined that the interpretation of the Contracting Officer is not

correct, an equitable adjustment in the job order price shall be made. Any conflict between this contract and any job order, including any plans and specifications shall be governed by the provisions of this contract.

* * * * *

Article 14. Disputes

Any disputes concerning a question of fact or price arising under this contract or under any job order or plans or specifications (other than matters to be determined by the Contracting Officer under Article 5(j) hereof) which is not disposed of by agreement between the Contractor and the Contracting Officer shall be referred to and decided by Commander, Military Sea Transportation Service, who shall furnish by mail or otherwise to the Contractor a copy of his decision. Within 30 days from the date of receipt of such copy, the Contractor may appeal such decision by mailing or otherwise furnishing to Commander, Military Sea Transportation Service, a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for hearing of such appeal shall be final and conclusive; provided that, if no such appeal is taken, the decision of Commander, Military Sea Transportation Service, shall be final and conclusive. In connection with any appeal from a decision by Commander, Military Sea Transportation Service, under this Article within the time limit herein specified, the Contractor shall be afforded an opportunity to be

heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract.

3. Specification No. MSTSP 51-64 provides as follows in pertinent part:

> * * * It is the intent of these specifications to provide for the complete repair and reconditioning, both mechanically and structurally, of five (5) lifeboats, all as necessary to place the boats in first class operating condition and ready for use.
>
> The work shall include, but shall not be limited to, any detailed specifications which follow:
>
> The contractor shall furnish all labor, materials, transportation and all other equipment necessary to completely repair four (4) #13 and #14 gauge galvanized steel hulls and one (1) aluminum hull lifeboats now located in Rows Numbers 1 and 4 open storage space adjacent to Warehouse 3, Oakland Army Base. * * *
>
> All work shall be subject to inspection and approval by the U. S. Coast Guard and the U. S. Navy Inspector assigned.* * *

4. Job Order No: 10, issued pursuant to Contract No: MST 235 provides as follows in pertinent part:

> This Job Order issued pursuant to the provisions of the above-numbered contract, the terms of which by this reference are made a part hereof, Witnesseth That:
>
> 1. Work: The Contractor shall furnish the supplies and services, required to perform the work

described in the attached plans and specifications made a part hereof and designated as follows: Repair to Five (5) Lifeboats, Specification No. MSTSP 51-64.

2. Price: The Government will pay the Contractor for the performance of this Job Order the following listed sum plus an amount at the unit prices on the reverse side hereof for the units specified and furnished under Article 3(c) of the above-numbered contract: $3,775.00.

* * * * *

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No. 14,389

IN THE

United States Court of Appeals

For the Ninth Circuit

TRIPLE "A" MACHINE SHOP, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S CLOSING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S CLOSING BRIEF.

In its reply brief, Respondent has followed the course of ignoring that which cannot be answered. In Libelant's Opening Brief, the following reversible errors are specified, which Respondent cannot and has not even attempted to answer, namely:

1. That the Trial Court was guilty of reversible error in making Findings of Fact that:

a. Omit essential material facts established by the evidence and the Pre-Trial Order.

b. Set forth "facts" that are directly contrary to the uncontradicted evidence.

c. Set forth conclusions of law as "facts".

(NOTE): All emphasis has been added.

2. That the trial court was guilty of reversible error in making Conclusions of Law, which are:

a. Contrary to law.

b. Based upon unsupported and erroneous findings of fact.

3. That the Trial Court was guilty of reversible error in:

a. Denying Libelant's motion to amend the Findings of Fact and Conclusions of Law.

b. Denying Libelant's motion for new trial.

4. That the Trial Court was guilty of reversible error in:

a. Making conclusions of law which are at variance with its order for judgment.

b. Making two "Final Decrees," each of which was at variance with the other, or at variance with the Court's Conclusions of Law, or the order for judgment.

The said errors are serious and material. Respondent has wholly failed to justify or explain away any of said judicial errors. We respectfully submit that, without going any further, the judgment of the Trial Court should be reversed on these grounds alone.

Respondent's brief deals solely with two other specifications of error, namely:

1. That the Trial Court was in error in ruling that the extra work here in question was covered by Libelant's bid.

2. That the determination of the Administrative Appeal Board was final and conclusive on the parties and the Court.

In its brief, Respondent prefaces a discussion of the said points by a "Statement." In its said "statement," Respondent sets forth as facts gross misstatements of the facts as established by the uncontradicted evidence. In support of the said erroneous statements of fact, Respondent makes reference to the transcript. It will be noted, however, that the references are to the Findings of Fact and not to the testimony or the Agreed Facts contained in the Pre-Trial Order.

Inasmuch as Respondent's brief and argument are premised upon numerous erroneous statements of fact, at least a few of said errors should be pointed out specifically by way of example. For instance, on page 3, Respondent states that Libelant's agent "made a thorough inspection of the five lifeboats as to their condition and need of repair." In support of said statement, Respondent refers to page 97 of the transcript. In other words, the said statement is taken as a direct quote from the Trial Court's erroneous Finding No. VI.

But a reference to the transcript of the testimony establishes without conflict or contradiction that Libelant's said agent inspected the lifeboats only as to the items specified in its bid, namely *Category A Items* (Rep. Tr. p. 128). It was not until the steel floors, metal tanks, etc. had been removed that anyone knew or could have ascertained what, if any, extra work would be required.

Likewise, Respondent states as a fact that Libelant's bid "was submitted on the basis of computations as to work necessary and cost thereof." In support thereof, Respondent refers to the Trial Court's erroneous and unsupported Finding No. VII. The evidence as established by the uncontradicted testimony is quite to the contrary (Tr. p. 170). In figuring the job, Libelant's agent computed only the cost of furnishing the *Category A Items* specified in its bid. And, up to this date, no one has claimed that Libelant's bid of $3,775.00 was not a very reasonable charge for furnishing said *Category A Items.*

On page 20 of its brief, Respondent comments on Libelant's contention that the extra work could not have been included in its bid by reason of the fact that the subsequently discovered defects could not have been detected until after the boats had been dismantled. To answer this, Respondent states: "On the basis of all evidence adduced at the trial, the trial court found that such items of repair were subject to inspection and ascertainment by libelant's representative prior to submission of the bid." Page 99 of the transcript, viz.—the Court's erroneous Finding No. XI, is cited in support of the above quoted statement. The Court's said finding is even more shocking and at variance with the uncontradicted evidence than is the said quoted statement. In its said Finding, the Court states: "That all such items of repair were visible and subject to inspection. . . ."

There is not one word in the record to support such a finding. To the contrary, the evidence estab-

lished, without conflict, that of the $6,000.00 worth of extra repairs, all but a few trifling items, such as the lifelines and two thwarts, could not be seen until the boats were completely dismantled (Rep. Tr. p. 129, 149).

It would seem obvious that erroneous and unsupported Findings cannot be used to support Respondent's argument. A direct reference to the testimony and the Agreed Facts in the Pre-Trial Order will establish that Respondent's statement of facts contains ~~may~~ many serious and material misstatements of facts.

We turn now to a consideration of the first point dealt with in Respondent's argument, namely, that Libelant was obligated under its contract to furnish the extras herein question without compensation therefor. In dealing with Respondent's said contention, we will endeavor to avoid a repetition of the points, authorities, and arguments set forth in Libelant's opening brief.

Respondent's argument in support of its said contention consists of repeating over and over again that the specifications state that it is intended that the lifeboats shall be put in proper condition before being returned to service. If the government had any other intention, it would be most shocking.

As is pointed out in Libelant's Opening Brief, the terms of the contract between the parties are established by the terms of Libelant's offer. The said offer

expressly incorporates a part, and only a part, of the specifications, namely, the *Category A Items.* Witnesses for both sides testified without conflict that Libelant's said bid was accepted by Respondent exactly as it was made. Neither Respondent nor the Trial Court has the power to read into that contract any provisions that are not expressly contained in the offer.

The said expressions of intent contained in the opening paragraphs of the specifications have no significance insofar as Libelant's contractual obligation is concerned. But, for the sake of argument only and for the purpose of exploding Respondent's said contention, we will briefly pursue Respondent's contention just as if Libelant had not expressly limited its bid to the portion of said specifications designated as *Category A Items.*

Even if we start with the false assumption that Libelant incorporated all of said specifications in its bid, where does that take us?—Absolutely nowhere! No amount of reading or study of the specifications will disclose one word which states or implies that subsequently discovered defects in the lifeboats will have to be repaired gratuitously by the contractor. The most that can be said is that the intent expressed in the preamble of the specifications puts the bidders on notice that the contractor may be required to furnish extra work. It certainly does not state that the contractor will have to furnish any additional repairs for free.

Legally, the said expression of intent adds nothing to the contractual duty of the successful bidder. Under the Master Contract, the bidder had already agreed that it could be required to furnish all extra repairs found necessary during the job, and that the contractor could not hold up the furnishing of said extras pending agreement as to the reasonable value thereof.

It would seem obvious that a ship repair job, as listed in *Category A* of the specifications and which was of the value of $3,775.00, would be a trivial fill-in job in the field of marineship repair. Since the Master Contract established that the contractor could be required to furnish extras, the only conceivable purpose of setting forth the said intention in the preamble of the specifications was to put all bidders on notice. If they expected to bid on this small job as a fill-in, they should be on notice that there might be extras, and they might have to pull workmen off other jobs to complete the extras; that if they would not have available men and materials to furnish any extra repairs that might be found necessary, then they should not bid.

What other reason could there be for notifying the contractors that extra work might be required? If it had been intended that the successful bidder would be required to furnish unknown extras without compensation, the specifications should and would have so stated. Of course, in such event, there would have been no bidders.

After dealing with said expressions of intent set forth in the specifications, Respondent points with

emphasis to the facts that the preamble of the specifications also states that "the work shall include, but shall not be limited to any detailed specifications which follow." But what does this prove? Certainly, it cannot be claimed that the said provision either states or implies that any additional work shall be furnished gratuitously. At best, this is merely a re-statement of the legal obligation under the terms of the Master Contract. The said provision merely constitutes a further notice to the bidders that they should not put in a bid if their plant facilities can only take care of furnishing the known repairs listed as *Category A Items.*

Next, Respondent stresses the fact that the preamble of the specifications states that "all work shall be subject to the inspection and approval of the U. S. Coast Guard and U. S. Inspector assigned." We fail to see any relevancy. All government ship repair work has to pass inspection whether the contract so states or not. In this case, all work furnished by Libelant, both *Category A Items* and extras, were so inspected and approved. The said quoted provision does not state or infer that if said inspector discovers additional defects in the lifeboats, the contractor can be required to furnish the same gratuitously or within the contract price. As a matter of fact, the said provision only authorizes the inspection of "all work." It does not state that an inspection shall be made of the boats during the course of the job to see if any other repairs are necessary. The right to make such inspection exists exclusive of anything in

the specifications. The boats are government owned and may be inspected at any time by government inspectors. Under the Master Contract, and not under the said provisions of the specifications, the contractor can be required to furnish all additional repairs found necessary.

Not only do the said provisions of the specifications give no support to Respondent's contention, but as is set forth in Libelant's opening brief, the said provisions form no part of Libelant's bid or contract. No matter how Respondent may seek to strain or distort the contract, it is simply an offer to furnish certain specified items at a definite price. The said offer could not be more simply or clearly stated (Ex. H, Tr. p. 58).

> "Triple A Machine Shop, Inc. . . . offers and agrees, if this bid is accepted . . . to furnish any and all items of supplies or services *described on the reverse side of this bid at the price set opposite each item.*"

And, of course, there was only one item on the reverse side, namely:

> "Category A Items"
> "Total Price $3775.00."

Respondent was under no obligation to accept said offer. But it did accept the offer without question or modification. Libelant's said offer to furnish *Category A Items* for $3,775.00 constituted the extent of its obligation under the contract. Under the previously executed Master Contract, Libelant was, of

course, contractually bound to furnish all extras found necessary during the job. But, under said Master Contract, Libelant was entitled to payment of the reasonable value of said extras.

Respondent's brief appears to recognize that the language of the specifications cannot be tortured into holding that the successful bidder will be required to gratuitously furnish the labor and materials required to repair all subsequently discovered defects. Respondent, therefore, shifts to a different position.

In this connection, Respondent seeks to set up a new contract for the parties, namely, the Job Order. This, Respondent states, "constituted a counter-offer to pay $3,775.00 for the performance of the work set forth in the entire attached specifications." However, there were no specifications attached to the job order! But, for purposes of this argument, we will assume that the specifications were attached, and that they were the identical specifications here in question. It will be noted, however, that in the above quoted statement, Respondent added the word "entire" to the text. The said job order provides as follows:

(Tr. p. 34)

> "1. Work: The Contractor shall furnish the supplies and services required to perform the work described in the attached plans and specifications made a part hereof and designated as follows: Repairs to Five (5) Lifeboats, Specifications No. MSTSP 51-64."

Respondent then states (p. 3), "This job order was accepted by Libelant under date of October 11,

1950. *Thereafter* Triple 'A' entered upon the performance of the work pursuant to the Master Contract, the specifications and the job order." But what are the facts? The record does not disclose, but it may be properly assumed, that Libelant followed the universal practice of contractors, and had its representative present at the opening of the bids on October 2, 1950. The record definitely establishes that Libelant's bid was accepted by Respondent on October 2, 1950. This is affirmatively established by the Agreed Facts of the Pre-Trial Order (Tr. p. 69). It is likewise admitted on page 3 of Respondent's brief, viz. "On October 2, 1950, MSTSP accepted the bid of Triple 'A' . . ." The Invitation to Bid (Ex. 3, Tr. p. 51) gives the starting time for the job:

> "3. Work is to commence:
> On award of job, on or about 2 October 1950."

So the bids were opened and Libelant's bid was accepted on October 2, 1950. Libelant moved the boats into its yard and immediately started work. There was no waiting for the job order, which did not arrive until October 11, 1950. In order to try to strain out from under the obligation of the contract which came into being on October 2, 1950, Respondent states that Libelant signed the job order on October 11, 1950, and "*thereafter* Triple 'A' entered upon performance of the work . . ." This, of course, is contrary to the fact, and there is nothing in the record to support such a statement.

As soon as its bid was accepted, Libelant started with the job, but the administrative machinery of the government does not move so rapidly. Often the job orders do not come through until weeks or months after the job has started (Tr. p. 172). To say that a belated job order constitutes a new contract or a counter-offer for a job that is under way under an accepted offer is absurd. If it were ever considered that such a transaction could constitute a new contract, it would then fall of its own weight. Libelant's offer to furnish specific items for $3,775.00 had been accepted, and the job was in progress. What, then, constituted the consideration for the new alleged obligation to furnish over $6,000.00 worth of additional items without compensation therefor?

Respondent's contention is based upon a further false assumption. Respondent assumes and states as a fact that the belated job order called for the furnishing of the extra work here in question without compensation therefor. This assumption is so seriously false and without foundation that it requires special comment.

As quoted above, the pertinent provisions of said job order provide that "the contractor shall furnish the supplies and services required to perform the *work described* in the attached plans and specifications" (no plans or specifications were attached). The question then arises as to what work is "*described*" in the specifications. Assuming that the specifications were attached to the job order, what do they show as to the "*work described*"? Clearly and without

question, the only *"work described"* in the specifications is the work listed and described under the heading *"Category A Items."*

There is no room for doubt or debate as to the meaning of *"work described."* Webster's definition of "describe" is:

> "To depict or portray in words;
>
> To give a clear and vivid exhibition in language."

If a copy of the specifications had been attached to the job order, wherein could one find a clear or vivid portrayal of a single item of the extra work here in question? The said extra work could not have been "described" in the specifications or elsewhere. The government planner who drew the specifications did not know or have any means of knowing whether any extra work would be required. The said extra work could not have been "described" by anyone until after the contract had been let and the boats had been completely dismantled.

If the job order has any legal significance as a contract, counter-offer, or otherwise, this could only arise out of the Master Contract. In fact, Respondent's brief clearly states that the job order is required by the Master Contract. Let us then see what the Master Contract states in reference to job orders.

(Ex. A, Cl. Tr. p. 25)

> "(a) Upon the issuance of a job order, the Contractor shall promptly commence the *'work specified'* therein and in any plans and specifications made a part thereof . . ."

It would seem that the meaning of "specified" is as clear and well understood as is the word "described." No work is "specified" in the job order, so let us assume that a copy of the specifications had been attached thereto. Could it then be said that a single item of the *extra* repair work was "specified" therein?

But, before proceeding further, let us definitely determine the meaning of the word "specified" as used in said Master Contract. Fortunately, on numerous occasions, the courts have been called upon to define and adjudicate the meaning of the word "specified." The decisions have been uniform in this regard. A number of said decisions have been compiled in the 1953 edition of "Words and Phrases." We quote a few.

Vol. 39B—Permanent Edition (1953):
"SPECIFIED"

"The word 'specified' as used in statute providing that a contract is an agreement between two or more parties for the doing or not doing of some 'specified' thing means mentioned or named in a specific or explicit manner or told or stated precisely or in detail. *Gray v. Aiken,* 54 S.E. 2d 587, 589, 205 Ga. 649."

"The word 'specified' has a clearly defined meaning. In the transitive it means to mention or name in a specific or explicit manner, to tell or state precisely or in detail; as to specify articles; whereas, in the intransitive it means to specify precisely or in detail, to give full particulars. *Duke Power Co. v. Essex County Board of Taxation,* 7 A. 2d 409."

> "The word 'specified' means to mention or name in a specific or explicit manner; to tell or state precisely or in detail. *Aleksich v. Industrial Accident Fund,* 151 P. 2d 1016."

How, then, can Respondent contend that the items of extra work are "*specified*" in the Specifications? It is obvious, of course, that it was impossible to "specify" said extra work in the Specifications. At the time the Specifications were prepared, no one knew or could have known whether these or any other items of extra work would subsequently be found necessary. A generalized statement of purpose to make all repairs that may be necessary to put the boats in proper condition is a far cry from proof that the admitted items of extra work are "specified" in the job order or Specifications. A mere recital that it subsequently may be found necessary to make repairs in addition to the repairs that are listed in *Category A* of the Specifications obviously does not support a contention that the indefinite and, in fact, unknown repairs are "specified" in the Specifications or Job Order.

The most that can be said of the belated job order is that it confirmed the contract entered into between the parties on October 2, 1950, under which Libelant was required to furnish the "work specified," namely, the *Category A Items,* for $3,775.00.

The remainder of Respondent's brief deals with the force and effect of the decision of Respondent's

administrative appeal board. We believe that this question has been rather thoroughly covered in Libelant's Opening Brief and that Respondent has wholly failed to answer the same. By reason of the seriousness of the question, we will briefly deal with Respondent's contention and will endeavor to avoid repetition of the points and authorities set forth in our opening brief.

The problem seems quite simple. At the time that Libelant signed said Master Contract, there was little legal or judicial restraint placed upon a party for contracting away his right to judicial review and redress in Court. The Master Contract had no expressed period of duration, and we assume that the same will be effective until revoked by the parties. We seriously doubt that one branch of the government can make a contract requiring the other party to forego its right to a day in court and project the same into the future, thereby making the same immune from laws subsequently passed by Congress. In other words, we believe that the Act of May 11, 1954, 68 Stat. 81, would apply to this case if we were here dealing with a decision made by an administrative appeal board under Art. 14 of said Master Contract.

But the decision here in question was not made under Art. 14. To the contrary, the administrative appeal board clearly and expressly made its decision under Art. 5(j) of the Master Contract.

The two provisions deal with different subjects and set up entirely different appellate proceedings, and

provide for different effectiveness of decisions on appeals under said sections.

1. Article 14 expressly excludes consideration of matters to be determined under Art. 5(j).

2. Under Art. 14, an appeal from the decision of the government's local contracting officer is to be referred to the Commander, Military Sea Transportation Service. The section then provides for a further appeal to the Secretary of the Navy. And, lastly and most important, the section expressly provides that the administrative decision on appeal shall be "final and conclusive."

3. Art. 5(j), with which we are here concerned, sets up an entirely different procedure for dealing with different subject matter, namely, controversies arising out of plans and specifications. It provides that a contractor may appeal to the Commander, M.S.T.S., for a decision of the local contracting officer. No provision is made for appealing to the Secretary of the Navy from the decision of the Commander of M.S.T.S.; and it is not specified or inferred that the Commander's decision shall be final or conclusive.

Respondent concedes that this controversy was properly a subject for appeal under Art. 5 and not under Art. 14. That ends the matter, unless Respondent is seriously contending that the Trial Court has the power to make a new contract for the parties.

There is no ambiguity in Art. 5(j) and, hence, there is no basis for judicial construction, which would add

a whole sentence to Art. 5(j) and deprive Libelant of its legal and constitutional right to judicial review and redress in Court. Even if the Act of May 11, 1954 should be held to be inapplicable to this case, it does establish that the people who go to make up this nation are opposed to their government denying the right of judicial review to those who deal with the government.

As is pointed out in Libelant's Opening Brief, the Courts hold that the right "to resort to the Courts . . . will not be denied unless the contract makes such conclusions inescapable."

It is therefore respectfully urged that the judgment of the Trial Court be reversed, with direction for judgment in favor of Libelant for the reasonable value of said extras, namely $6,040.00.

Dated, San Francisco, California,
March 31, 1955.

Respectfully submitted,
J. THADDEUS CLINE,
Proctor for Libelant.